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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1915 1914

No. [redacted] 44

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

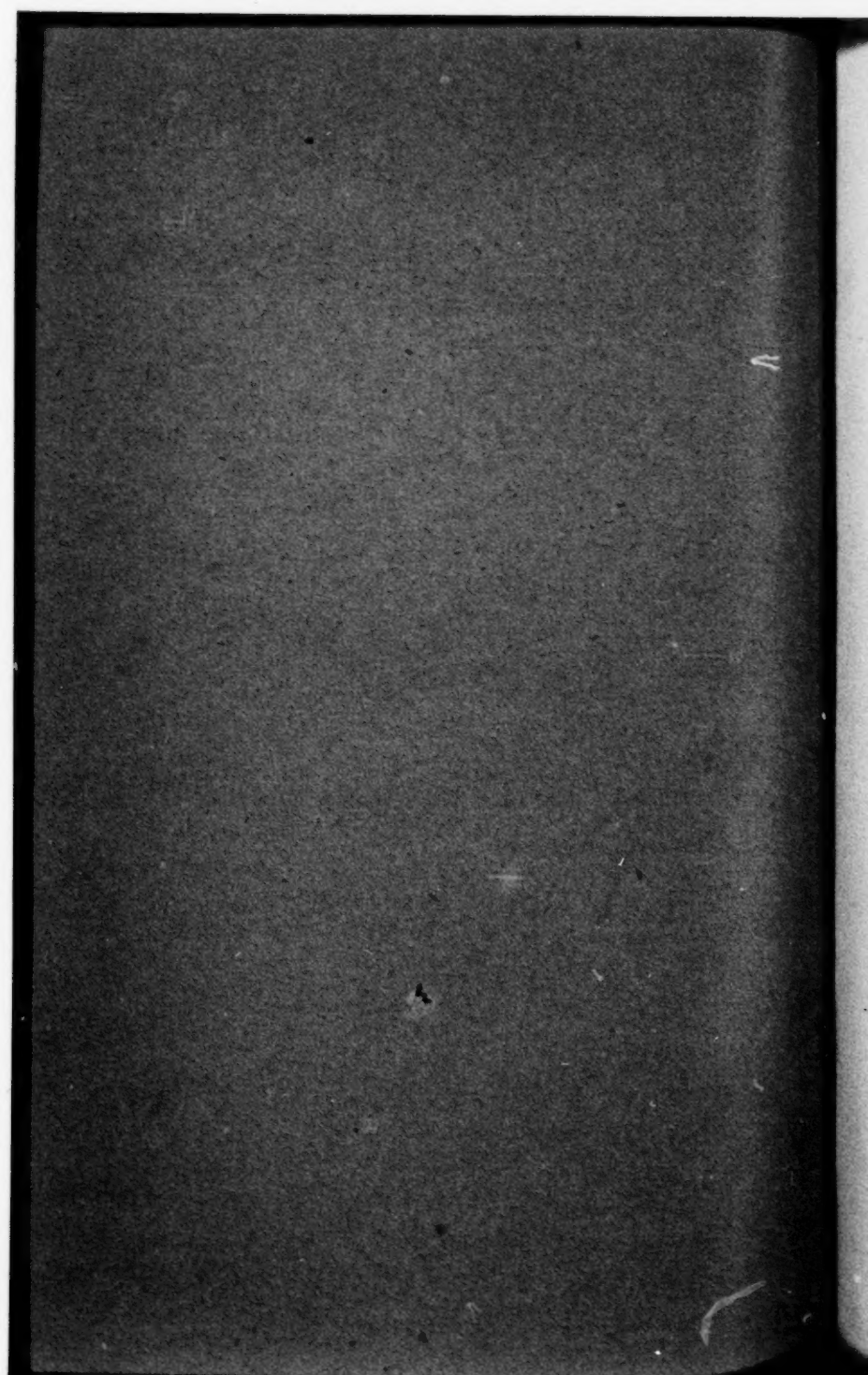
vs.

THE NEW YORK AND PORTO RICO STEAMSHIP COMPANY.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JANUARY 5, 1914.

(28999.)



# SUPREME COURT OF THE UNITED STATES.

**October Term, 1913.**

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## No. 848.

## THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

## THE NEW YORK AND PORTO RICO STEAMSHIP COMPANY.

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N ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## Writ of Error.



United States of America, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To

The Judges of the District Court of the United States, for the Southern District of New York,

GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between United States of America, plaintiff, and New York and Porto Rico Steamship Company, defendant, a manifest error hath happened, to the great damage of the said United States of America, as is said and appeaers by its complaint, WE, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, DO COMMAND YOU, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the UNITED STATES CIRCUIT COURT OF APPEALS for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 20th day of December, 1913, that the record and proceedings aforesaid being inspected, the said Judges of the UNITED STATES CIRCUIT COURT OF APPEALS for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.





WITNESS, the Honorable GEORGE C. HOLT, United States District Judge, Southern District of New York, this

4 *Writ of Error.*

20th day of November, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-eighth.

ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

5 C. M. HOUGH,
U. S. District Judge.

(Endorsed): filed November 20, 1913.

6

## Summons.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,
against
NEW YORK AND PORTO RICO STEAMSHIP COMPANY,
Defendant.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Edward D. White, Chief Justice of the United States, at the Borough of Manhattan in the City of New York, this 24th day of February, in the year one thousand nine hundred and eleven.

JOHN A. SHIELDS,
Clerk.

HENRY A. WISE,
U. S. Attorney, Plaintiff's Attorney,
Office and Post-Office Address,
Room 50, U. S. Court and P. O. Building,
Borough of Manhattan, New York City.

(Endorsed): filed February 25, 1911.

10 **Complaint.**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,
against
NEW YORK AND PORTO RICO STEAMSHIP COMPANY,
Defendant.

11

The plaintiff, for its complaint in the above entitled action, by Henry A. Wise, United States Attorney for the Southern District of New York, on information and belief respectfully alleges:

FOR A FIRST CAUSE OF ACTION:

I. That the plaintiff is a corporation sovereign; that the New York and Porto Rico Steamship Company, the defendant above named, is a corporation organized and existing under the laws of the State of Maine, and having its principal office for the
12 conduct of its business in the City of New York, Southern District of New York.

II. That on or about the 9th day of November, 1909, the plaintiff requested in writing of the defendant that the defendant submit to the plaintiff a written tender for the transportation of not less than eight thousand (8,000) tons of coal from Norfolk, Newport News, Baltimore or Philadelphia, to Mare Island or San Francisco, the point of loading and the point of destination to be at the option of the said United States, and the time of loading to be on or before December 25, 1909; that the said

writing provided that the vessels to be furnished by the defendant and to be used in the said transportation must be named in the tender or at least ten days before the date of loading; that on November 13, 1909, the defendant submitted to the plaintiff a written offer, signed by the defendant, to furnish two steamers to transport the said coal in accordance with the aforesaid request at the rate of Three and thirty-three one hundredths dollars ($3.33) per ton, and the defendant further offered in said writing to have the said steamers ready for loading between December 10th and December 25th, 1909, and to nominate the said steamers at least ten days before December 25, 1909; that on November 13, 1909, and after the receipt of the said offer by the plaintiff, the plaintiff duly accepted the said offer by a writing signed by the officer of the United States duly authorized to make such contract on behalf of the plaintiff, and therein agreed to pay the defendant for such transportation the sum of Three and thirty-three one hundredths dollars ($3.33) per ton; that on November 15, 1909, the defendant, in a writing duly signed by it, acknowledged the receipt of the aforesaid acceptance and confirmed the terms of the same.

III. That the defendant failed and refused to nominate the said steamers at any time on or before December 25, 1909, and to furnish the said two steamers at any time, and to transport any part of the coal above described, and has wholly failed and refused to perform any part of the services in and about the furnishing of the said steamers and the transportation of the said coal agreed to be performed by it.

16 *Complaint.*

IV. That at the time and place appointed for the performance of the contract by the plaintiff on its part, the plaintiff was ready, willing and able to furnish the coal for transportation and to pay the defendant the amount agreed to be paid by it, and the plaintiff has duly performed all the conditions of the aforesaid contract on its part to be performed.

V. That the aggregate contract price for the transportation of the lowest quantity of coal agreed
17 to be transported by the defendant, to wit, eight thousand (8,000) tons, was the sum of $26,640; that the lowest aggregate price which could be obtained at the time and place of performance of the aforesaid contract for the transportation of the quantity of coal agreed to be transported by the defendant was the sum of $36,889.20; that the said sum of $36,889.20 was less than the general market price prevailing at the time and place of performance of the aforesaid contract: that the plaintiff secured the transportation of the coal, which the defendant agreed to transport as aforesaid, and paid therefor the sum of $36,889.20.

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VI. That by reason of the foregoing the plaintiff has been damaged in the sum of $10,249.20, and the said sum is due and owing from the defendant to the plaintiff: that no part thereof has been paid by the defendant, although duly demanded of it by the plaintiff.

FOR A SECOND CAUSE OF ACTION:

VII. That the plaintiff is a corporation sovereign; that the New York and Porto Rico Steamship Company, the defendant above named, is a corporation organized and existing under the laws of

the State of Maine, and having its principal office for the conduct of its business in the City of New York, Southern District of New York.

VIII. That on or about the 9th day of November, 1909, the plaintiff requested in writing of the defendant that the defendant submit to the plaintiff a written tender for the transportation of not less than eight thousand (8,000) tons of coal from Norfolk, Newport News, Baltimore or Philadelphia, to Mare Island or San Francisco, the point of loading and the point of destination to be at the option of the said United States, and the time of loading to be on or before December 25, 1909; that the said writing provided that the vessels to be furnished by the defendant and to be used in the said transportation must be named in the tender or at least ten days before the date of loading; that on November 13, 1909, the defendant submitted to the plaintiff a written offer, signed by the defendant, to furnish two steamers to transport at least eight thousand (8,000) tons of coal and to transport the said coal in accordance with the aforesaid request at the rate of Three and thirty-three one hundredths dollars ($3.33) per ton, and the defendant further offered in said writing to have the said steamers ready for loading between December 10th and December 25th, 1909, and to nominate the said steamers at least ten days before December 25, 1909; that on November 13, 1909, and after the receipt of the said offer by the plaintiff, the plaintiff duly accepted the said offer by a writing signed by the officer of the United States duly authorized to make such contract on behalf of the plaintiff, and therein agreed to pay the defendant for such transportation the sum of Three and thirty-three one hundredths dollars ($3.33) per ton; that on November 15, 1909, the

defendant, in a writing duly signed by it, acknowledged the receipt of the aforesaid acceptance and confirmed the terms of the same.

IX. That on or about the 14th day of December, 1909, the defendant, by a writing duly signed by it, notified the plaintiff that the defendant would be unable to furnish the steamers agreed to be furnished by it and to transport the coal as agreed, and further notified the plaintiff in said writing that it would not furnish the said steamers or trans-
23 port the said coal, and further notified the plaintiff in the said writing that the defendant must either make default in its engagement to the plaintiff under the aforesaid contract or suffer a heavy loss, and the defendant thereupon in said writing requested the plaintiff to procure the steamers agreed to be furnished by it and to procure the transportation of the said coal, either by diverting the tonnage already under charter to the plaintiff for other ports or to secure new tonnage in the general market, and therein promised and agreed to pay plaintiff the difference between the price at which the defendant had offered to furnish the said trans-
24 portation and which had been accepted by the plaintiff, and the expense incurred by the plaintiff by reason of diverting the tonnage aforesaid or procuring new tonnage in the general market.

X. That the defendant failed and refused to nominate the said steamers at any time on or before December 25, 1909, and to furnish the said two steamers at any time, and to transport any part of the coal above described, and has wholly failed and refused to perform any part of the services in and about the furnishing of the said steamers and the

transportation of the said coal agreed to be performed by it.

XI. That at the time and place appointed for the performance of the contract by the plaintiff on its part, the plaintiff was at all times ready, willing and able to furnish the coal for transportation and to pay the defendant the amount agreed to be paid by the plaintiff for transporting the said coal; that the plaintiff has duly performed all the conditions of the aforesaid contract on its part to be performed.

XII. That, pursuant to the said request of the defendant, the plaintiff diverted tonnage already under charter to it at an increase of cost to the plaintiff over the price agreed to be paid by it to the defendant of the sum of $10,249.20; that the plaintiff actually expended said increased sum for the purpose of procuring the transportation agreed to be furnished by defendant; that plaintiff procured the said transportation at less than the general market price prevailing at the time and place of performance of the aforesaid contract by the defendant.

XIII. That no part of the said sum of $10,249.20 has been paid to plaintiff by defendant; that the said sum is due and owing to the plaintiff from the defendant, and that demand for the payment thereof has been duly made; that by reason of the foregoing the defendant has become indebted to the plaintiff in the sum of $10,249.20.

FOR A THIRD CAUSE OF ACTION:

XIV. That the plaintiff is a corporation sovereign; that the New York & Porto Rico Steamship

28 *Complaint.*

Company, the defendant above named, is a corporation organized and existing under the laws of the State of Maine, having its principal office for the conduct of its business in the City of New York, Southern District of New York.

XV. That on or about the 14th day of December, 1909, the defendant requested of the plaintiff that the plaintiff pay and expend for and on account of the defendant the sum of $10,249.20; that the plaintiff did thereupon and on or about the
29 25th day of December, 1909, and pursuant to said request, pay and expend the said sum for and on account of the defendant; that the defendant promised and agreed to repay the said sum on demand; that demand therefor has been duly made by the plaintiff on the defendant and that no part thereof has been paid; that there is now due and owing from the defendant to the plaintiff the sum of $10,249.20.

Wherefore, plaintiff demands judgment against the defendant for the sum of $10,249.20, together with interest thereon from December 25, 1909, and
30 the costs and disbursements of this action.

HENRY A. WISE,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,
Office and Post Office Address,
Room 50, Post Office Building,
Borough of Manhattan,
City of New York.

31

State of New York,
County of New York,
Southern District of New York, } ss.:

Isaac H. Levy, being duly sworn, deposes and says that he is an assistant to the United States Attorney for the Southern District of New York, the attorney for the plaintiff in the within entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the reason why this verification is made by deponent and not by plaintiff is that plaintiff is a corporation sovereign.

32

That the sources of deponent's information and the grounds of his belief, as to all the matters set forth in said complaint not stated upon his knowledge, are letters and copies of letters between the plaintiff and the defendant relating to the transaction set forth in the complaint, and official reports of certain officers of the United States having charge of the said matters.

ISAAC H. LEVY.

33

Sworn to before me this
21st day of February, 1911.
Frederick L. Campbell,
Notary Public,
Kings Co.
Cert. filed in N. Y. Co.
(Seal)

(Endorsed): filed February 25, 1911.

34 **Answer.**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,
against
NEW YORK & PORTO RICO STEAMSHIP COMPANY,
35 Defendant.

The defendant, for its answer in the above entitled action, by Burlingham, Montgomery & Beecher, its attorneys, respectfully shows to the Court and alleges:

First: It admits the allegations of the first article of the complaint.

Second: It admits that on or about the dates mentioned in the second article of the complaint correspondence between itself and the plaintiff took
36 place as alleged in the said second article, but denies that the same resulted in a contract or agreement as alleged, or in any contract or agreement whatsoever, or that it at any time confirmed the terms of any contract or agreement based on or contained in the said correspondence.

Third: It admits the allegations of the third article of the complaint, except that it denies that it ever agreed to perform the services alleged in the said third article.

Fourth: It denies any knowledge or information

sufficient to form a belief as to the allegations of the fourth article of the complaint. 37

Fifth: It denies any knowledge or information sufficient to form a belief as to the allegations of the fifth article of the complaint, except that it admits that at defendant's offer the total sum for the transportation of 8,000 tons of coal was $26,640.

Sixth: It denies each and every allegation of the sixth article of the complaint, except that it admits that the plaintiff has demanded of it the sum of $10,249.20, and that payment thereof has been refused. 38

enth article of the complaint.

Eighth: It admits that on or about the dates mentioned in the eighth article of the complaint correspondence between itself and the plaintiff took place as alleged in the said eighth article, but denies that the same resulted in a contract or agreement as alleged, or in any contract or agreement whatsoever, or that it at any time confirmed the terms of any contract or agreement based on or contained in the said correspondence. 39

Ninth: It admits the allegations of the ninth article of the complaint, except that it denies that it at any time made a contract with the plaintiff or that it requested the plaintiff to procure the steamers and the transportation of coal as alleged, or that it promised and agreed to pay the plaintiff any sum whatsoever in respect thereto.

Tenth: It admits the allegations of the tenth article of the complaint, except that it denies that

it ever agreed to perform the services alleged in the said tenth article.

Eleventh: It denies any knowledge or information sufficient to form a belief as to the allegations of the eleventh and twelfth articles of the complaint.

Twelfth: It denies each and every allegation of the thirteenth article of the complaint, except that it admits that the plaintiff has demanded of it the sum of $10,249.20, and that payment thereof has been refused.

Thirteenth: It admits the allegations of the fourteenth article of the complaint.

Fourteenth: It denies any knowledge or information sufficient to form a belief as to the expenditures alleged in the fifteenth article of the complaint, and it denies each and every other allegation of the said fifteenth article, except that it admits that the plaintiff has demanded of it the sum of $10,249.20, and that payment thereof has been refused.

Fifteenth: FOR A SEPARATE DEFENSE TO THE ENTIRE COMPLAINT, the defendant alleges that each and every transaction therein mentioned took place between the defendant on the one part and the Secretary of the Navy and his subordinates, acting for and on behalf of the United States, on the other part; that Section 3744 of the Revised Statutes of the United States prescribes:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy and of the Secretary of the Interior to cause and require every contract

made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing and signed by the contracting parties with their names at the end thereof; * * *"

and that section 3747 of the Revised Statutes of the United States prescribes:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy and of the Secretary of the Interior to furnish every officer appointed by them with authority to make contracts on behalf of the Government with a printed letter of instructions setting forth the duties of such officer under the two preceding sections, and also to furnish therewith forms printed in blank of contracts to be made * * *." (Act of June 2, 1862, Chap. 93, 12 Stat. L., 411.)

That the alleged contract, or contracts, mentioned in the complaint were not drawn upon the printed forms prescribed in Section 3747 above quoted, nor were they reduced to writing and signed by the contracting parties with their names at the end thereof, as required by Section 3744.

Sixteenth: FOR A SEPARATE DEFENSE TO THE SECOND AND THIRD COUNTS OF THE COMPLAINT, it alleges that it gave to the plaintiff a certain notice contained in a letter dated December 14th, 1909, addressed by James H. Hayden, its attorney, to Rear Admiral Eustace B. Rogers, Paymaster General, United States Navy, a copy whereof is hereto annexed and made a part hereof as Exhibit "A," in which it requested that the plaintiff advise it in respect to any contract closed for the transportation therein mentioned; that the plaintiff in a letter dated December 16th, 1909, addressed to said James H. Hayden and signed by C. J. Peoples, Paymaster, United States Navy, a copy whereof is hereto annexed and

46 *Answer.*

made a part hereof as Exhibit "B," agreed to advise it in respect to any arrangements the plaintiff might make in regard thereto; that, nevertheless, plaintiff has utterly failed at any time to advise the defendant in respect to any of the matters in regard to which it was agreed to advise defendant.

SEVENTEENTH: FOR A SEPARATE DEFENSE TO THE SECOND AND THIRD COUNTS OF THE COMPLAINT, it alleges that it gave to the plaintiff a certain notice contained in a letter dated December 14th, 1909, ad-
47 dressed by James H. Hayden, its attorney, to Rear Admiral Eustace B. Rogers, Paymaster General, United States Navy, a copy whereof is hereto annexed and made a part hereof as Exhibit "A," which, in part, read:

"We request you to procure the transportation which this company formally tendered, either by diverting tonnage already under charter to your department for other ports or by securing new tonnage in the general market, provided, of course, that such transportation can be secured by the department by one of those means at a reasonable cost."

That, subsequently and within ten days or there-
48 abouts, thereafter, the defendant, by its attorney, the said James H. Hayden, withdrew and utterly disaffirmed the matters and propositions in the said letter contained, and notified the Secretary of the Navy that it would not be responsible for any extra expense to which the plaintiff might be put, or might incur on that account; and, on information and belief, the defendant alleges that any diversion of tonnage alleged to have been procured by the plaintiff for the defendant at defendant's request was not procured, nor even begun, until after the defendant had, through its said attorney, so with-

49

drawn and disaffirmed its letter of December 14th, 1909.

Wherefore, the defendant demands judgment that the complaint herein be dismissed with costs

BURLINGHAM, MONTGOMERY & BEECHER,
Attorneys for Defendant,
27 William Street,
New York City.

---

**Exhibit "A."**

50

December 14th, 1909.

Dear Sir:

Confirming what was said in the course of our interview this morning, I beg to say: On November 13th last, the New York & Porto Rico Steamship Company submitted tenders for the transportation of two cargoes of coal from Philadelphia, Baltimore, or Norfolk, to the Mare Island Navy Yard, San Francisco, at $3.58 per ton, the vessels to be nominated on or before December 1st and the cancellation date being December 10th, and two cargoes at $3.33 per ton, the vessels to be nominated December 15th and the cancellation date being De- 51
cember 25th. On November 13th, the company was notified by the Purchasing Pay Officer that its tender was accepted for two cargoes, at $3.33 per ton, the vessels to be nominated and report for loading in conformity with the tender. When the tender was submitted, the company was in negotiation for the charter of one or more British steamers of suitable capacity. The acceptance of the company's tender became known among ship owners of this country and England almost as soon as it was communicated to this company as the successful bidder. American and foreign owners then realized

52 *Answer.*

that the company had no tonnage with which to fulfill its engagements. We are informed and believe that a combination was made among these owners to prevent the company from chartering tonnage for the December sailings, except at a rate so exorbitant that it would mean a heavy loss. In furtherance of that combination, the offer of British tonnage, that the company had under consideration, was withdrawn by the owners of the vessels in question. Thereafter, the company, though zealous in prosecuting inquiries about, and making offers for,
53 suitable tonnage, was unable to get any. For a time it had a standing offer of $4.00 per ton, being sixty-seven cents per ton more than the company would have received from the Department under its tender. No tonnage was procurable at that figure and for some days past the company has been considering charters at higher rates. Within the past day or two, one steamer, which would not have been available for December loading was offered at $4.75 per ton. The company believes that this unprecedented increase in charter rates is the result of the combination mentioned, the intent and purpose of which is to cause it to make default under
54 its engagement to your department, or else to suffer so heavy a loss that it will desist in future from competing with other firms engaged in the business. These are closely identified with foreign ship owners.

Under the circumstances mentioned, the company is constrained to advise you that it cannot furnish the transportation tendered. Inasmuch as we are advised by you that no extension or postponement of loading can be granted, because the coal must be delivered at the Mare Island Navy Yard by the middle of February in order to supply the Pacific fleet, which will call there at that time, we request

you to procure the transportation, which this company formally tendered, either by diverting tonnage already under charter to your Department for other ports, or by securing new tonnage in the general market, *provided,* of course, that such transportation can be secured by the Department by one of those means at a reasonable cost. I respectfully request that, before any contract is closed for the transportation in question, you will have the goodness to advise me of its terms. 55

Very respectfully yours,

JAMES H. HAYDEN,
Attorney for New York &
Porto Rico Steamship Company. 56

Rear Admiral Eustace B. Rogers,
Paymaster General, U. S. N.,
Navy Department.

## Exhibit "B."

In reply refer to
No. 110539.

NAVY DEPARTMENT,
BUREAU OF SUPPLIES AND ACCOUNTS,
Washington, D. C.

December 16, 1909. 57

Sir:

1. The Bureau wishes to acknowledge receipt of your letter of the 14th instant; and will advise you at a later date as to the best arrangements which can be made, relative to diverting to San Francisco the two steamers now under charter for other ports or to obtain or secure these cargoes in the open market.

By direction of the Paymaster General.

Respectfully,

C. J. PEOPLES,
Paymaster, U. S. Navy,
In Charge of the Contract Section.

58 *Answer.*

Mr. James H. Hayden,
Bond Building,
Washington, D. C.

City and County and State of New York, ss.:

Franklin D. Mooney, being duly sworn, says that he is the Vice-President and an officer of the New York and Porto Rico Steamship Company, the corporation defendant in the above-entitled action; that the foregoing answer is true to the knowledge of this deponent, except as to the matters therein stated to be alleged on information and belief, and
59 that as to those matters he believes it to be true; that the reason why this verification is not made by the defendant is because the defendant is a corporation; that the grounds of deponent's belief as to all matters in said answer not stated upon his knowledge are investigations which deponent has caused to be made concerning the subject-matter of this action and information acquired by deponent in the course of his duties as an officer of the corporation defendant in this action.

FRANKLIN D. MOONEY.

Sworn to before me this 20th
day of July, 1911.
60 Richard D. Wrigley,
Notary Public,
Kings County.

Certificate filed in New York County.

(Seal)

(Endorsed): filed July 20, 1911.

## Extract from Minutes.

61

At a Stated Term of the District Court of the United States of America, for the Southern District of New York, held at the United States Court Rooms in the U. S. Court and Post Office Building, Borough of Manhattan, City of New York, on Tuesday, the 21st day of October, in the year of our Lord one thousand nine hundred and thirteen.

Present: The Honorable C. M. HOUGH, 62
District Judge.

| | |
|---|---|
| UNITED STATES OF AMERICA, Plaintiff, vs. NEW YORK & PORTO RICO STEAMSHIP COMPANY, Defendant. | L6-174. |

Now comes the plaintiff, by Addison S. Pratt, Esq., Assistant U. S. Atty., and moves the trial 63
of this cause. Likewise comes the defendant by N. B. Beecher, Esq., its attorney. Thereupon a jury is duly impaneled and sworn, and the cause proceeds to trial. Both counsel agree to try the case on the same record that was tried before Judge Mayer.

At the close of the testimony, both parties move for a direction of a verdict.

Verdict directed for the defendant. Pltff's Atty. excepts and moves for a new trial. Motion denied.

An extract from the Minutes.

ALEX. GILCHRIST, JR.,
Clerk.

64 **Judgment.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NEW YORK & PORTO RICO STEAMSHIP COMPANY,
65 Defendant.

The issues in the above entitled action having duly come on for trial before Hon. Charles M. Hough, United States District Judge, and a jury, on the 21st day of October, 1913, at the United States Court House and Post Office Building in the Borough of Manhattan, City and County of New York, and the respective parties having appeared by their attorneys, and the Court having heard the testimony and proofs offered by the parties, and both parties having moved for a direc-
66 tion of a verdict and the Court having directed the jury to find a verdict in favor of the defendant and the jury having thereupon found a verdict in favor of the defendant,

Now, on motion of Burlingham, Montgomery & Beecher, attorneys for the defendant, it is

Ordered, Adjudged and Decreed that the defendant, New York & Porto Rico Steamship Company, do have judgment against the plaintiff, United States of America, upon the issues herein.

Judgment signed this 5th day of November, 1913.

ALEX. GILCHRIST, JR.,
Clerk.

(Endorsed): filed November 5, 1913.

**Bill of Exceptions.** 67

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NEW YORK AND PORTO RICO
STEAMSHIP COMPANY,
Defendant. 68

Before: HON. CHARLES M. HOUGH, District Judge, and a Jury.

New York, October 21, 1913.

APPEARANCES.

H. SNOWDEN MARSHALL,
United States Attorney for the Southern District of New York.
ADDISON S. PRATT,
Assistant United States Attorney, 69
For Plaintiff.
BURLINGHAM, MONTGOMERY & BEECHER,
NORMAN B. BEECHER,
RAY ROOD ALLEN,
Of counsel,
For Defendant.

A Jury is empanelled and sworn.

Mr. Pratt opened the case to the Jury on behalf of the plaintiff, and Mr. Beecher opened the case to the Jury on behalf of the defendant.

Mr. Pratt: If Your Honor please, this is the

second trial of this case which was tried last winter before Judge Mayer, without a jury. He directed a judgment in favor of the Government, and the defendant appealed, and it was reversed by the Circuit Court of Appeals, which sent it back for a new trial.

Mr. Pratt: The Government offers in evidence invitation for tenders, dated November 9, 1909.

Mr. Beecher: I object to it as immaterial, irrelevant and incompetent.

The Court: I will receive it. You are not object-
71 ing to the copy?

Mr. Beecher: Not at all. My objection goes principally to the fact that the Government is entitled to recover, if at all, only upon proof of a contract executed in accordance with the statute, and this has no tendency to show such a contract, and in consequence no relevancy.

The Court: Your objection really goes to the basis of the case?

Mr. Beecher: That is it.

Mr. Pratt: You do not object to the secondary form of proof?

Mr. Beecher: Not at all.

72 Mr. Pratt: Nor does your objection to the competency of the other documents that I will offer extend to the fact that they are secondary evidence?

Mr. Beecher: With the understanding that it is mutual, and subject to correction.

Paper received in evidence and marked U. S. Exhibit 1.

Exception to defendant.

Mr. Pratt: I offer in evidence a communication, dated November 13, 1909, from the New York & Porto Rico Steamship Company to the Navy Department.

Mr. Beecher: I make the same objection to each of these documents. I suppose it will be considered as entered on the minutes each time, with my exception. 73

The Court: Yes.

Paper received in evidence and marked U. S. Exhibit 2.

Mr. Pratt: I offer in evidence a communication from the Navy Department to the New York & Porto Rico Steamship Company, a telegram, dated November 13, 1909.

Received in evidence and marked U. S. Exhibit 3. 74

Mr. Beecher: Referring to plaintiff's Exhibit 3, the meaning of "25 cancelling" is that the steamer must be tendered for loading before the 25th, otherwise the charter may be cancelled. E. B. Rogers, who signed the telegram, was the Paymaster-General of the Navy Department.

Mr. Pratt: I offer in evidence a letter dated November 15, 1909, from the New York & Porto Rico Steamship Company to the Navy Department.

Received in evidence and marked U. S. Exhibit 4.

Mr. Pratt: I next offer a letter of November 18, 1909, signed New York & Porto Rico Steamship Company, by Richard D. Wrigley, addressed to the 75 Navy Department.

Received in evidence and marked U. S. Exhibit 5.

Mr. Pratt: I offer in evidence a letter from the Paymaster of the Navy to the New York & Porto Rico Steamship Company, dated November 19, 1909.

Received in evidence and marked U. S. Exhibit 6.

Mr. Pratt: I offer in evidence a letter of November 19, 1909, signed by Richard D. Wrigley, Manager Chartering Department of the New York & Porto Rico Steamship Company, addressed to the Navy Department.

Received in evidence and marked U. S. Exhibit 7.

Mr. Pratt: I offer in evidence a letter of November 23, 1909, from Richard D. Wrigley to the Navy Department.

Received in evidence and marked U. S. Exhibit 8.

Mr. Pratt: I offer in evidence a letter of November 30, 1909, from Richard D. Wrigley to the Navy Department.

Received in evidence and marked U. S. Exhibit 9.

Mr. Pratt: I offer in evidence a letter of December 9, 1909, from the paymaster to the New York
77 & Porto Rico Steamship Company.

Received in evidence and marked U. S. Exhibit 10.

Mr. Pratt: There is no doubt that the Hayden there referred to is James H. Hayden?

Mr. Beecher: No.

Mr. Pratt: I offer in evidence a letter of December 14, 1909, from James H. Hayden to Rear Admiral Eustace B. Rogers, Paymaster-General.

Received in evidence and marked U. S. Exhibit 11.

Mr. Pratt: Since you have made a general objection as to competency, you don't object as to the
78 authority of Mr. Hayden, do you?

Mr. Beecher: No.

The Court: Or as to Mr. Wrigley?

Mr. Beecher: Not at all. In the same way, I may say that you have no objection to the authority of the various gentlemen who purported to act for the Navy Department?

Mr. Pratt: No. I offer in evidence a letter of December 16, 1909, from the paymaster to Mr. Hayden.

Received in evidence and marked U. S. Exhibit 12.

Mr. Pratt: I offer in evidence a letter of December

24, 1909, from Mr. Hayden to Honorable Beekman Winthrop, Assistant Secretary of the Navy. 79

Received in evidence and marked U. S. Exhibit 13.

It is agreed that there was a letter from Mr. Beekman Winthrop, dated the 28th of December, appointing a meeting for the 30th of December.

Mr. Pratt: I offer in evidence a letter of December 29, 1909, from Mr. Hayden to Hon. Beekman Winthrop. This letter Mr. Hayden presented at the hearing on the 30th of December, the hearing before Hon. Beekman Winthrop, Assistant Secre- 80
tary of the Navy.

Received in evidence and marked U. S. Exhibit 14.

Mr. Pratt: Now I am going back to cover the arrangement with the Baker Transportation Company, and I offer first the request for tenders, dated December 14, 1909. On December 14th, 1909, there is a request for tenders in practically the same form as the first, except that it calls for the transportation of two or four cargoes, not less than four thousand tons each, of coal, from Norfolk, Newport News or Baltimore, to Mare Island, San Francisco or Honolulu, bids to be opened on the 18th. 81

Received in evidence and marked U. S. Exhibit 15.

Mr. Pratt: I offer in evidence a list of the bids received on December 18th, 1909.

Received in evidence and marked U. S. Exhibit 16.

Mr. Pratt: The Baker Transportation Company did not submit any bid. The Baker Transportation Company was already under contract and had steamers en route to Honolulu, the steamers "Falls

of Orchy" and "Earl of Elgin" being en route to Honolulu. I offer in evidence a letter from Paymaster Peoples to the Baker Transportation Company, dated December 18, 1909.

Received in evidence and marked U. S. Exhibit 17.

Mr. Pratt: I offer in evidence a telegram from Commander Reese, from Honolulu, dated December 20th, 1909.

Received in evidence and marked U. S. Exhibit 18.

83 Mr. Pratt: It is agreed that the foregoing telegram is from Commander Reese in Honolulu to the Bureau of Supplies and Accounts at Washington, and that the translation of it is as follows:

"Orchy sailed for Mare Island December 20, Monday, at 3 P. M."

Mr. Beecher: I make an objection to all of these communications to the Baker Transportation Company and others as *res inter alios acta*, and not affecting this defendant.

Mr. Pratt: I am anticipating, which I would not ordinarily do, the defense that before the request was acted upon it was withdrawn. Of course that
84 a request was acted upon by diversion at a certain date may be *res inter alios*, but *res inter alios* are relevant and material to this case, to show that the Government had already acted upon it by December 20th.

Mr. Beecher: Will you agree that we may put in such further correspondence that you had with the Baker Company as we may see fit?

Mr. Pratt: Of course, any official correspondence we have no objection to. You don't object to the method of proving it, of proving the diversion, you simply object to the fact that we did divert?

Mr. Beecher: Yes.

Mr. Pratt: I offer in evidence a telegram from Commander Reese, from Honolulu, dated December 28, 1909, to the Bureau of Supplies at Washington. 85

Received in evidence and marked U. S. Exhibit 19.

It is agreed that the translation of the telegram, Exhibit 19, is as follows:

"The Earl of Elgin sailed December 28, Tuesday, at 9 A. M."

Mr. Pratt: Will you concede that the "Falls of Orchy" arrived at Mare Island on January 4, 1910? 86

Mr. Beecher: Yes, sir.

Mr. Pratt: And that the "Earl of Elgin" arrived at California City on January 8th, 1910?

Mr. Beecher: Yes, sir.

Mr. Pratt: Now, there are some formal allegations of the complaint that have been put in issue that I understand will be admitted. The first is the allegation in paragraph 4 that at the time and place appointed for the performance of the contract by the plaintiff on its part, the plaintiff was ready and willing and able to furnish the coal for transportation and pay the defendant the amount agreed to be paid. 87

Mr. Beecher: We will concede that between December 15th and December 25th—we will concede that between November 15th and December 26th, the United States was ready and willing to furnish coal for transportation in vessels furnished by the defendant, had the defendant tendered any vessels, and to pay the sum of $3.33 for each ton.

Mr. Pratt: That relates to the first and second causes of action. Now, there is another allegation that is denied. You deny knowledge or information as to our payment. Will you admit that we

paid the Baker Transportation Company the sum of $9,679.80, in addition to the contract price with them, that additional sum being for the diversion of these two cargoes in the "Earl of Elgin" and the "Falls of Orchy" from Honolulu to San Francisco? I am only asking you to admit the fact of the actual payment by the Government.

It is stipulated and agreed that the United States paid to the Baker Transportation Company the sum of 85 cents per ton additional on 11,388 tons for diverting the "Falls of Orchy" and "The Earl
89 of Elgin," from Honolulu, Hawaii, to San Francisco, or Mare Island, California. This concession is made by the defendant without in any way admitting that the fact is material, relevant or competent to the issues here, and without admitting that the coal so diverted was intended for or to take the place of the coal to be carried on any other vessels, and without admitting that the United States was under any obligation, contractual or otherwise, to pay any such sum to the Baker Transportation Company, or any sum whatever.

Mr. Pratt: I offer in evidence a letter of December 21, 1909, from J. A. Mudd, Pay Inspector of
90 the Navy at New York City, to the Baker Transportation Company.

Received in evidence and marked U. S. Exhibit 20.

Mr. Pratt: I offer in evidence a letter from the Baker Transportation Company, dated December 23, 1909.

Received in evidence and marked U. S. Exhibit 21.

It is admitted that the fleet for which the coal was being provided arrived at San Francisco on or about February 20, 1910, this admission being made subject to correction.

GOVERNMENT RESTS.

Mr. Beecher: I move to strike out all the evidence offered by the Government on the ground that it is incompetent and immaterial and irrelevant, and does not tend to show any right of action against the defendant.

The Court: Motion denied.

Mr. Beecher: Exception.

I now move to dismiss the complaint and that a verdict be directed for the defendant upon the ground that the United States has failed to 92
prove any cause of action against the defendant, has failed to show any damages, has failed to show any contract between the Government and the defendant, and has failed to show any compliance by the Government with the requirements of the statute in relation to the making of contracts between the Navy Department and citizens, referring to Section 3744 of the Revised Statutes. So far as it relates to the second and third causes of action, that the Government has failed to show that it has done any act or performed any services or expended any money for or on behalf of the defendant or for its benefit or at its request, and that as to those 93
causes of action, as well as to all the causes of action, it has failed to prove any cause of action against the defendant.

The Court: Motion denied. I will hear your evidence.

Mr. Beecher: Exception.

Mr. Beecher: As the Court has admitted in evidence the correspondence offered by the United States, and assuming that the record shows the overruling of my objection, I offer in evidence from the same correspondence, the endorsement of November 16, 1909, by the Paymaster-General. The

94 *Richard D. Wrigley—Direct.*

purpose of this is to show that the diversion referred to in the Government's case in chief was not procured to take the place of tonnage that had been covered by the defendant's tender of November 13th, 1909.

Received in evidence and marked Defendant's Exhibit A.

Mr. Beecher: For the same purpose I offer in evidence a letter from Mr. Peoples to the Baker Transportation Company, dated December 13, 1909.

95 Received in evidence and marked Defendant's Exhibit B.

Mr. Beecher: For the same purpose I offer in evidence a letter or memorandum relating to the contract between the United States and the Baker Transportation Company, dated August 31, 1909.

Received in evidence and marked Defendant's Exhibit C.

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RICHARD D. WRIGLEY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

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Direct-examination to Mr. Beecher:

I have been in the steamship business for a number of years, and am familiar with that business between the east coast of the United States and the west coast. The usual running time for coal carrying steamships between Newport News, or Norfolk, and San Francisco is 68 to 75 days. The time occupied by the "Longships," a vessel furnished to the United States by the Hasler & Leach Company, and sailing from Newport News with coal for San Francisco, December 29, 1909, was 74 days. The steamer "Huttonwood," sailing from

Newport News June 25, 1909, was 75 days; the steamer "Camp Hill," sailing from Baltimore, July 29th, was 70 days; the steamer "Strathblane," sailing from this side on December 1st, was 68 days. The steamers I refer to carried cargoes of coal for the United States Government from coaling ports to San Francisco. The cargoes were between five and six thousand tons.

Cross-examination to Mr. Pratt:

I don't know how many vessels there were in the Pacific fleet in the latter part of 1909 and in 1910. I don't know how much coal they consumed. I 98
don't know how much coal there was at Mare Island or California City points. I do not know how much coal there was at Honolulu.

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JAMES H. HAYDEN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct-examination to Mr. Beecher:

I am an attorney in Washington, D. C., and was acting as attorney for the defendant in this case 99
during the time covered by these transactions in 1909 and 1910, beginning with a time early in December. The bid or the tender had passed through my office, but my personal connection with the matter began, as I recall it, on December 4th, when I called on Mr. Peoples. On December 4th, and again on December 11th, I called on Mr. Peoples, explaining that the company was experiencing trouble in securing tonnage, and gave reasons, as it has been stated in the correspondence, and endeavored to obtain an extension. He told me that it could not be granted, because of the need of having a supply

of coal at San Francisco about the middle of February for the Pacific fleet, which was expected to call for the coal at that time. On the 11th I received from the Navy Department formal tender blanks, or proposal blanks. Those are the blanks which I received. I submitted them to the company for signature on December 11th. They were never signed so far as my knowledge goes.

Mr. Beecher: I offer them in evidence.

Received in evidence and marked Defendant's Exhibit D.

On December 14th, the time for nominations, the company's time for nominations closing on the 15th, I called on Mr. Peoples. I told him that I had been advised that he had opened negotiations with the Baker Transportation Company looking to the diversion of certain tonnage that the department had under charter from the Baker Company. Mr. Peoples told me that that negotiation did not relate to the supplying of tonnage expected from the New York & Porto Rico Company, that the Department had purposely kept out of the market up to that time to avoid competing with the New York & Porto Rico Company for its tonnage. As to whether the Bureau expected to require or ship any more coal to San Francisco, he told me that this was additional tonnage that the Bureau wished to ship to San Francisco, that is, in addition to that expected from the New York & Porto Rico Company, to make up a sufficient supply.

To the Court:

That this Baker Company tonnage was additional.

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To Mr. Beecher:

I asked him if he could secure the diversion of additional vessels in case the New York & Porto Rico Steamship Company were unable to furnish it. He said he would see. The paymaster-general, who was present, said, "I wish you would put any suggestion of that kind that you may have to make in writing." I said before making an offer of that kind I desired an opportunity to confer with the company. After conferring I returned, and either handed then, or subsequently sent by mail, my letter

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of December 14th, which is in evidence, Plaintiff's Exhibit 11. At that time, to the best of my recollection, Mr. Peoples, or it may have been the paymaster-general, told me that they would advertise at once for tonnage, take other steps to see what could be done about diversion. I had subsequent conversation with Mr. Peoples. I saw him from time to time up to the 20th. The conferences were of no special significance until that date. I then told him that the very high rate named by bidders whose bids were opened on the 18th had been circulated generally among shipping men, and the New York & Porto Rico Company felt that it would be

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impossible for it to secure any tonnage in the market except at an enormous rate, within a week or ten days. Mr. Peoples told me that he was in the way of arranging for a diversion of two steamers; he did not tell me what they were. That was on the 20th. Then on the 22nd I saw the paymaster-general, or rather in this talk on the 20th with Mr. Peoples. I asked what would be the method of adjusting any question with respect to penalty that might arise between the New York & Porto Rico Company and the Department. He told me that the paymaster-general would have charge of that.

106 *James H. Hayden—Direct.*

On the 22nd I saw the paymaster-general; he told me that the diversion had been arranged; that it would cost the government to put down the coal in San Francisco 90 cents a ton more than the rate tendered by the New York & Porto Rico Company, and that the matter of determining whether or not to impose a penalty, or what the penalty should be, would, in accordance with the Department's practice, be sent to the Secretary for his determination, and that in this particular case it would be sent to the Assistant Secretary, Mr. Beekman Winthrop.

107 On the 24th I wrote to Mr. Winthrop asking for a hearing. That letter is in evidence. The Secretary appointed the 30th, and at that time Mr. Wrigley and I appeared before him, our presentation of the case being substantially as set forth in my letter of the 29th, which the Government has put in evidence, in which we took the position that no penalty could be exacted of the company, and that, even admitting it could, we believed that the Department should remit it, and in any case, if the company were liable for a penalty, and the Department saw fit to exact it, it could not exceed the extra freight on the minimum tonnage that the company could have

108 carried and still fulfilled its tender. Then subsequently I was advised that the Department denied the application. My letter was not answered for a long time; I believe at the end of February, February 23rd. Then subsequently the Navy Department sent a bill to the New York & Porto Rico Steamship Company, sending me a copy of it. This is the bill.

Cross-examination to Mr. Pratt:

December 4th, to the best of my recollection, was the first time that I saw Mr. Peoples to inform him of the difficulty that my company was having

in getting the two steamers. I have, in the correspondence that I carried on with the company during this transaction, a record of those conversations with him. I know of no instance where I confirmed conversations by writing letters to the Navy Department, except on the 14th, when, having made a verbal request that the department endeavor to secure by diversion or new contract two vessels to take the place of those tendered by the New York & Porto Rico Steamship Company, at the suggestion of the paymaster-general I put that in writing, after conferring with the company. On 110
December 4, 1909, I told Mr. Peoples that the New York & Porto Rico Steamship Company was experiencing difficulty in getting the two steamers. I told him that the company had reason to believe that there was a combination among foreign owners or their agents in this country to drive the New York & Porto Rico Steamship Company out of the trade, that that was my information, and the company's information, and that freight rates to San Francisco had gone up to an unprecedented degree. My recollection is that I may have told him what rates were being asked of the New York & Porto Rico Steamship Company at that time. I am not 111
sure whether I told him that on the 4th or not. I am unable to say what rates were being asked of my company at that time. All such things were being taken care of in New York. I took no part in the business affairs, simply the transactions with the bureau. Nothing was said about having the United States procure this tonnage in the market until the idea of diversion was suggested to me on the 14th, when it became known to me that Mr. Peoples had opened negotiations with the Baker Company on the preceding day for the diversion of

112 *James H. Hayden—Cross.*

two steamers. On December 4th, as early as December 4th, I stated to Mr. Peoples that there was a combination directed against the New York & Porto Rico Steamship Company. The same situation existed on December 11th, 1909. That was my information. I have no recollection of suggesting on December 4th to Mr. Peoples that the government might procure better rates by re-advertising. I have no recollection of making that suggestion on December 11th either. I am quite sure that I did not. I believed that, inasmuch as the de-
113 partment in certain other cases had granted extensions of the time for loading, that we could persuade it to grant an extension of the time allowed to the New York & Porto Rico Steamship Company. That was my purpose in going to see Mr. Peoples. My purpose was to ask for an extension. I asked for an extension. It was refused to me on December 4th. I was told that we would have to be ready by December 15th to nominate our steamers. The same was told me on December 11th. I repeated the application for an extension, and, I believe, explained what the company had done in the direction of attempts to charter certain vessels. I do
114 not recall the details, however, at this time. On December 14th I did not go again to request an extension. I had learned by telephone from the company that the Baker Company had been asked to divert two of its steamers from Honolulu to San Francisco, which seemed rather surprising—I went there to ask why the department was negotiating that tonnage in advance of the end of the term during which the New York & Porto Rico Company could nominate vessels. I did not go to ask for an extension on December 14th. December 15th was the date stipulated in the company's letter of November 13th for tender of the steamers. I did not

go to protest against the Government's advertising for new vessels before December 15th. Of course the Government had a right to go into the market, but I went up to see. As Mr. Peoples explained to me, the Government had not then gone into the general market, but had gone to the Baker Company with a view to securing the diversion of two vessels already under charter for Honolulu, and then at sea. I did not go to protest, but to inquire the purpose of the Government in opening negotiations with the Baker Company for a diversion of tonnage. 115

Q. And on December 14th you requested the Government to go into the market, or to divert tonnage, according to your letter? A. Subsequent to our conversation I presented that letter. 116

There were two or three conversations other than those on December 4th, December 11th and December 14th, up to the time of my writing the letter of December 14th, but nothing of any moment. I have no recollection of what they were. I may have dropped in simply to say that the company was still experiencing difficulty. The first I was told that the Government had diverted the Baker Transportation was on December 22nd. The paymaster-general told me that the diversion had been accomplished, and that the additional cost of putting down the coal in San Francisco would be ninety cents. 117

Q. That is the diversion requested in your letter of December 14th, 1909? A. That was not specified.

I supposed he meant a diversion to take the place of the steamers that the Department had expected from the defendant company. That was my understanding. My recollection is that he told me then that it was the Baker Transportation Company and that the excess of rate was 90 cents over the

$3.33 that is referred to in these various writings with the New York & Porto Rico Steamship Company. I knew that the Government advertised in the open market on December 14th, 1909. I understood that Mr. Peoples made the advertisement on that date after our talk, and possibly even the receipt of my letter. I knew that bids were received on December 18th, 1909, in response to that advertisement, but I was not present. I learned it shortly after. Mr. Dalzell of my office was present. There was no conversation by me or in my behalf
119 with any one in the Navy Department with reference to the bids that were received on December 18th, 1909. The conversation of December 14th, 1909, was simply this, that Mr. Peoples, or the paymaster-general, on receipt of my letter, said that they would immediately advertise for new tonnage. You see there was an interval between my first conversation with them, in which I made inquiry about their opening negotiations with the Baker Company, and was told that that was to secure tonnage in addition to that expected from the New York & Porto Rico Steamship Company. I made my inquiry whether the bureau could get further di-
120 version, and the paymaster-general asked me to make any proposition of that sort formally, and I then asked for an opportunity to confer with the company in New York. After doing so I made a formal application. Then the Government advertised in the market for new bids. We had a representative present at the opening of those bids on December 18th, 1909, and I believe during the day I called on Mr. Peoples. I cannot give you the precise moment, the first time I went to the bureau on December 14, but my recollection is that I received a telephone from Wrigley quite early that morning,

or found a note of it on my desk, when I reached my office in the neighborhood of ten, and after that I went to the Bureau of Supplies and Accounts, or, rather, Mr. Peoples' office. I did not go there when the bids were opened on December 18, but Mr. Dalzell, of my office, did, and it is my recollection that I did see Mr. Peoples later on that day. I am unable to give the conversation on that day, Decembeer 18. I had been advised by Mr. Dalzell, when I went over first, as to the bids that had been received. Mr. Dalzell brought me a list of them.

Q. How much of an extension did you ask for on 122
December 4? A. It was indefinite.

In asking for an extension on December 11, I don't recall that any definite limit was named, but the request was that the time should be sufficient to allow the inflation to subside and enable the company to secure the tonnage. I am not aware that I told Mr. Peoples, after I knew of the bids that were received on December 18, that they were much better than the company had been offered. I believe I had mentioned these figures at which tonnage had been offered to the company, and it was obvious that some of these of December 18th were less. The purport of Mr. Peoples' statement on 123
the morning of the 14th was that the negotiations begun by him on the 13th with the Baker Company were for the diversion of tonnage to San Francisco in addition to that which was then expected from the New York & Porto Rico Company, and it was then that I suggested, that I asked whether the Bureau could divert additional vessels which might be substituted for those covered by the New York & Porto Rico Company's tender. It was prior to December 13 that I had laid before Mr. Peoples the position of the New York & Porto Rico Company and had asked for an extension. The time for

nominating vessels had not then expired, but the company had experienced, so I was informed, unusual difficulty in obtaining tonnage. The company knew that it was encountering difficulty in chartering vessels to nominate and that was the fact that I communicated to Mr. Peoples. I believe I told him the rates as demanded by one or two of the vessels. I did not tell him that rather than pay those rates, the rates demanded, the company would default. I did not, on December 11, assure him that in spite of the rates the company
125 would nominate its vessels on December 15. In these conversations in which I laid before Mr. Peoples the difficulty of the company, I did not assure him that in spite of the difficulties the company would make its nominations on the 15th. You will appreciate, being in Washington, and not a shipping man, I could not do that. I merely passed on to Mr. Peoples the information which was given me by the officials of the company in New York. I have in the course of my testimony described all that occurred in both of the interviews that I had with Mr. Peoples, him and the paymaster-general, on the 14th. My last answer which
126 related—was only responsive to your question about a particular part of our conversation, and it does not cover the whole interview. There was nothing beyond this, that that negotiation, begun between the Bureau and the Baker Transportation Company on the 13th, related to the diversion of vessels without thought of putting them in the place of vessels that it was then expected would be supplied by the New York & Porto Rico Company. It is my recollection that on December 22nd, I saw the paymaster-general and, I think, Mr. Peoples was present at the same time, and was told that the diversion

had been arranged, that it was the Baker Transportation Company and that the additional charge for putting down coal in San Francisco would be 90 cents per ton more than that named by the New York & Porto Rico Company in their letter of November 13. I don't recall that they told me also that the tonnage diverted was approximately 11,000 tons. In fact, I am quite sure the tonnage of the vessels diverted was not mentioned in our interview of this day; my inquiry was chiefly as to the penalty or damage, that it be disposed of, and I was told that would be referred to the Secretary or 128
Assistant Secretary of the Navy. That I don't recall, whether the names of the vessels were mentioned. I am unable to give you the date I first heard the names of the vessels. Possibly my letters may show; I may have done that before writing the Secretary on the 24th, and possibly before writing to him on the 29th, and maybe not until after that; on December 20th he did not tell me that it was an accomplished fact or mention the rate. He told me he was in the way of arranging for the diversion of two vessels to take the coal that had been intended to be transported by vessels furnished by the New York & Porto Rico Company, but without 129
mentioning the ones or the rate which would be asked for diversion. I recall no telephone conversation with Mr. Peoples on December 16 in which I said that I had heard, or that the company had heard, that the Baker Transportation Company had offered to divert the "Earl of Elgin" at 75 pounds per day, that is, $375 approximately, and the "Falls of Orchy" at $1.50 a ton additional. I can say nothing as to its having taken place or not, except that I don't recall it.

DEFENDANT RESTS.

130 *Christian Joy Peoples—Direct.*

CHRISTIAN JOY PEOPLES, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct-examination to Mr. Pratt:

I am paymaster, with the rank of lieutenant commander, of the United States Navy. I have been in the naval service about fourteen years. I was stationed at Washington first, in charge of the contract seection, from September 28, 1904, to January 28, 1911. I had general charge of contracts for fur-
131 nishing coal and transportation for coal for the fleet under the direction of the paymaster-general; I was his first assistant in matters pertaining to subjects like that. There are coaling stations on the Pacific coast belonging to the United States at Honolulu; Mare Island, California; California City Point, California; Navy Yard at Puget Sound; the Naval Coal Depot at San Diego—the latter is not used any longer. It was not used in 1909. The capacity of the depots at California City was 28,000 tons and at Mare Island about 24,000 tons. In October, November and December, 1909, and January and February, 1910, the American fleet in the
132 Pacific Ocean consisted of eight armoured cruisers. Their headquarters were at San Francisco and at Puget Sound. These cruisers had been in the Pacific waters prior to January 1st, 1910, probably in the neighborhood of a year or longer. They cruised up and down the Pacific Coast. The primary base was San Francisco and the Navy Yard at Mare Island; the secondary base was Puget Sound. After January 1st, 1910, they were there probably for nine months or a year longer, with the same base. Each cruiser carries as capacity about 2,000 tons; took about 6,000 tons of coal each on the cruise. One of the principal duties I had was to see that the

depots at Mare Island and California City were kept filled to a certain capacity for the purpose of providing the Pacific cruisers with coal. I did not wait until the coal ran out. The "Falls of Orchy" sailed from Newport News, October 19, 1909. The "Earl of Elgin" sailed from Baltimore, Maryland, October 23rd, 1909, for Honolulu. The distance from Newport News and from Baltimore to Honolulu is approximately the same as the distance from those points to San Francisco. They take the same length of time, that is, steamers sailing directly from Hampton Roads to Honolulu would require 134 approximately the same length of time as to San Francisco. Our average time to sail from Hampton Roads to San Francisco was 65 days, and from Honolulu to San Francisco in the neighborhood of ten to twelve days. I have cruised in those waters. It is 2,100 miles from Honolulu to San Francisco.

I have heard Mr. Hayden's testimony with reference to two conversations, one of December 4 and one of December 11; yes, sir. Those conversations were held with me prior to December 13th. There were repeated conversations, whether they were on any other dates than December 4 and 11, I do not recollect, but I know the matter was of great im- 135 portance between the New York & Porto Rico Steamship Company and the Bureau, and in the neighborhood of several days before the 14th there were several conversations on the question as to the probable failure of the New York & Porto Rico Steamship Company to get these two steamers: it was prior to that time, for a period of probably ten days, before the final dates for the nominations for the steamers was closed. In those conversations, Mr. Hayden asked for an extension of time for the New York & Porto Rico Company to nominate its

136 *Christian Joy Peoples—Direct.*

vessels. He dwelt upon the difficulty of foreign ship owners furnishing these steamers to the New York & Porto Rico Company, substantially as he has stated. He requested an extension of time, which he was informed was against the policy of the Department to grant, because—I told him that the coal was needed as soon as we could possibly get it there. In November, the fleet was on its cruise to the southern testing property grounds at Magdalena Bay, and the Department expected the fleet would return north, arriving in San Francisco
137 sometime in February, and thus, with a view to, which would cause an undue expenditure of coal from the coal depots and thus coal was intended to get there so as to supply the needs of the fleet. It was expected then that the fleet would stay at San Francisco several weeks. My arrangements for supplying coal were made with that in view. I dictated or wrote this letter of December 13 to the Baker Transportation Company, Defendant's Exhibit B. That letter was written after the difficulties of the New York & Porto Rico Steamship Company had been pointed out to me by Mr. Hayden and it was a known fact they were going to fall
138 down in getting their tonnage.

Q. They had but two days after that in which to nominate their ships? A. Yes, sir.

Mr. Hayden is incorrect in testifying that on December 14 I stated to him that this letter was written to the Baker Transportation Company, or that negotiations had been opened with the Baker Transportation Company, not for vessels to replace those to be nominated by the New York & Porto Rico Steamship Company, but to move additional tonnage. I made no statement that this was additional tonnage. On the morning of the 14th of December, Mr. Hayden told me that there might

be a possibility of getting this tonnage from the Baker Transportation Company in case we could not get it from other ship companies in the market, and then he pointed out in the remainder of this conversation there that the New York & Porto Rico Company were unable to get their tonnage, and he requested that we had better proceed and get the tonnage from other parties or divert it from other sources, provided it could be done at a reasonable cost. In answer to that, we asked him to please confirm that in writing, and we would go ahead accordingly, and, that afternoon, the circulars were 140
sent out to seventy odd shipping concerns with bids to be opened four days later. The requests for tenders were issued after Mr. Hayden's letter was received on December 14. The opening of bids was to be four days later, so as to get the best possible arrangement. Mr. Hayden was very much in this conversation, said he regretted very much indeed the failure of the New York & Porto Rico Company to get this tonnage and he hoped that the Bureau would be able to get it at as reasonable rates as possible. After December 22nd the Department next applied to the general market or otherwise for vessels to transport coal to the Pa- 141
cific coast, sometime in January, 1910. After December 14, 1909, I don't recollect any conversations with Mr. Hayden, telephonic or otherwise, with reference to the Baker Transportation Company, until after the bids were opened on December 18th.

On December 16 there was a telephone communication received from Mr. Hayden, I recall, showing that they knew, to the effect that the owners of the "Falls of Orchy" had made an offer to the Bureau through the Baker Transportation Company, to the effect that they were willing to have her diverted from Honolulu to San Francisco for 75 pounds or

142 *Christian Joy Peoples—Direct.*

$375 per day for each day's steaming, and the "Earl of Elgin" at $1.50 per ton additional to her original rate; I recall that on the 16th. My answer was to the effect that we were still in negotiations with the Baker Transportation Company and that we expected to force them down to a much more reasonable rate, as would be determined by the result of competitive bidding on the 18th. I made a memorandum at the time of that conversation. I just happened to make it. On the day, in the afternoon, that the bids were opened, Mr. Hayden was
143 in the paymaster general's own office, and it was pointed out to him that the lowest bid received was $4.49 from one firm for a new steamer, from another firm $4.45 to divert a steamer from Cavite to San Francisco, and the Baker Transportation Company had reduced their offer to 85 cents per ton additional, or a total of $4.23. Mr. Hayden was asked if the New York & Porto Rico Steamship Company could do any better than that, and his reply was that those rates were better than they were able to obtain and that they would have to depend upon the Bureau to supply these two steamers for them. Then, the offer of the Baker Trans-
144 portation Company was accepted and took place outside of the paymaster-general's own office. The Baker Transportation Company's final offer was 85 cents per ton. We had the two offers—one 85 cents, and one of $4.45 to divert from Cavite to San Francisco—and one for $4.49 for a new steamer.

To the Court:

We had those offers from the Baker people. There was something like eight or ten other offers.

Cross-examination to Mr. Beecher:

At this time I had been engaged in the purchase of coal and transportation since the 22nd of March

or February, the 23rd of February, 1909. I was in the Bureau prior to that time. From that date I was responsible for the purchase of coal and transportation; when it was transferred from the Bureau to the Bureau of Supplies and Accounts. I was familiar with the law with relation to contracts made by my department. I was familiar with the statutory provision as to the execution of contracts to be signed by both parties. 145

When the original proposals or requests for bids were made for four ships, it was expected that by reason of the arrival of the fleet in San Francisco they would require coal for the coaling depots, and that these ships need not necessarily arrive there at the time the fleet arrived, but they would have to arrive there to fill up the coal depots. This coal is issued to the fleet at all times during the year. 146

Q. The fleet had been away on a long cruise before that, and it was expected they would come back with empty bunkers, and therefore it was the intention of your Department to have the coal there? A. I cannot answer that question. It was estimated that there would be on hand at California City in February about 15,000 tons and at Mare Island about 11,000 tons for the fleet; in other words, the fleet was not entirely dependent upon these two steamers, not by any means, because both of them carried only about 10,000 or 11,000 tons, both of these steamers. 147

Q. Now, you said on your direct-examination that your letter of the 13th of December, Defendant's Exhibit B, was written when you had obtained knowledge of the fact that the defendant would fall down in supplying these two steamers? A. Yes, sir; it was expected. It was a known fact. That was my understanding. I learned it at that time

from conversations which I had with Mr. Hayden wherein he told me that they requested an extension of time for nominating because the New York & Porto Rico Steamship Company would be unable to get their two steamers on time. So I at once went to work to anticipate—to see what could be done.

It was not my intention at that time to close with the Baker Transportation Company if we could secure favorable terms for diversion, not until we saw the result of what the New York &
149 Porto Rico Steamship Company were going to do, although I knew that the New York & Porto Rico Steamship Company could not and would not fulfill the expectations to furnish steamers, what Mr. Hayden said he knew he could not do. Saturday afternoon, either then or early Monday morning, Mr. Hayden was informed as to all the details; in that connection at that conversation with him he was informed of all the details of the opening of the bids and was shown the result of them and the offer of the Baker Transportation Company. He was asked if the New York & Porto Rico Steamship Company could do any better and he said no, they
150 could not; they would have to depend on the bureau. I think that conversation took place on the afternoon of the 18th, because Mr. Hayden said we had a conversation on that day. It might have been on the morning of the 20th of December, but it was before any offer was accepted from the Baker Transportation Company.

Q. Well, now, as a matter of fact, didn't you say to Mr. Hayden on the morning of the 20th, that you were in the way of arranging for the diversion of the Baker Transportation Co., without definitely stating to him that you had closed with them? A. No, sir; I did not. He was informed as to the

actual status of the case at that time. We closed with the Baker Transportation Company on the 20th; I think so; I feel certain about that—no, it was on the 18th, the day I had the talk with Mr. Hayden, late in the afternoon; I know that.

Mr. Pratt: What is meant by the word closed?

Mr. Beecher: Told them their offer of diversion was accepted.

In the telephone conversation which I had with 152
the Baker Transportation Company on the 18th, I simply received the offer. I don't know whether I talked to them on the telephone again. There were repeated telephone communications, eight or ten a day, between New York, with the Baker Company and others. Later on the 18th I wrote to the Baker Company definitely closing.

Q. Mr. Peoples, you have made some statement in regard to the offer of the "Falls of Orchy" at some 75 pounds per day for diversion; wouldn't it have been very much cheaper to have accepted that offer rather than to have paid the additional amount which was required by the subsequent 153
offer? A. Well, two steamers, the offer was made, you know, as I remember, one at 75 pounds and the other at $1.50 a ton additional; $1.50 was finally worked down to 85 cents.

Q. But it would have been very much cheaper to settle on $1.75 a ton additional for the "Falls of Orchy" than to have paid 85 cents additional? A. I don't know.

Mr. Pratt: It cannot be doubted that 75 pounds a day for 10½ days would have been cheaper than 85 cents a ton, but the witness

154 *Christian Joy Peoples—Cross.*

says the offer was made 75 pounds a day for one and $1.50 per ton for the other.

To the Court:

Their offer of $375 a day was construed to mean that for every day that the Government would take her in requiring to steam from Honolulu to San Francisco and discharge her, they would pay the owners $375 a day; it was an unknown figure exactly; it could be estimated; for instance, probably ten days to steam and twelve or fourteen days to
155 discharge her would mean twenty-four or twenty-five days, $375 a day. That offer, or conversation, came from Mr. Hayden; I have a record of offers that were made by the Baker Transportation Company, made direct to the Bureau, and I don't recall that they ever made any such offer to the Bureau direct. Mr. Hayden telephoned me this offer was understood.

It is stipulated and agreed that payment was made by the United States to the Baker Transportation Company for carrying two cargoes of coal to Mare Island in the vessels "Falls of Orchy" and "Earl of Elgin," on January 28, 1910, and that
156 the cost of transporting the next shipment of coal from the Atlantic coast to Mare Island after the arrival of the two vessels above named, was $4.50 per ton.

BOTH SIDES REST.

Mr. Pratt: As there is no dispute with regard to the facts, the sole question in the case being one of law, I move that a verdict be directed for the plaintiff.

Mr. Beecher: I also move that a verdict be directed for the defendant.

The Court: As I read the opinion of the Circuit Court of Appeals on the record that was then before it, which is the same record that is now before me, it holds that judgment on the previous trial should have been directed for the defendant instead of for the plaintiff. I will therefore deny the motion of the Government for a verdict in its favor and will grant the motion of the defendant for a verdict in its favor. 157

Mr. Pratt: I except to Your Honor's ruling in refusing to direct a verdict for the plaintiff and in directing a verdict for the defendant and ask that the same be set aside and that a new trial be granted upon all the grounds specified in Section 999 of the New York Code of Civil Procedure. 158

The Court: Motion denied.

Mr. Pratt: Exception.

The Court: For as much as the exceptions, matters and things would not otherwise appear in the record, I have settled and signed this Bill of Exceptions on the prayer of the plaintiff by its counsel, and it is ordered that the same be filed as a part of the record herein *nunc pro tunc* as of the date of the trial.

Dated: New York, November 20, 1913.

C. M. HOUGH,
United States District Judge. 159

Notice of presentation waived.

BURLINGHAM, MONTGOMERY & BEECHER,
Attorneys for Defendant.

(Endorsed): filed November 20, 1913.

160 **Assignment of Errors.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NEW YORK AND PORTO RICO
STEAMSHIP COMPANY,
161 Defendant.

Now comes The United States of America, by H. Snowden Marshall, United States Attorney for the Southern District of New York, its attorney, and makes and files the following Assignment of Errors, which it alleges occurred upon the proceedings herein and upon which it will rely in the prosecution of its writ of error herein:

1. The Court erred in directing a verdict for the defendant herein;

162 2. The Court erred in entering judgment herein for the defendant and against the plaintiff;

3. The Court erred in holding and deciding that the plaintiff did not prove a valid contract between it and the defendant, within the terms of Section 3744 of the Revised Statutes of the United States; and that the contract that was proved was invalid, under the said Section, because it had not been reduced to writing and signed by the contracting parties with their names at the end thereof.

And the United States prays that the judgment of this Court herein, in favor of the defendant and

against the plaintiff, for the errors aforesaid, and for other errors in the record and proceedings herein, may be reversed and for naught held and esteemed, and that it may be restored to all things which it has lost by reason of such judgment.

New York, November 20, 1913.

H. SNOWDEN MARSHALL,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,
Office and Post Office Address: 164
Room 50, United States Court and
Post Office Building,
Borough of Manhattan,
City of New York.

(Endorsed): filed November 20, 1913.

165

166 **Plaintiff's Exhibit 1.**

NAVY DEPARTMENT,
BUREAU OF SUPPLIES AND ACCOUNTS,
Washington, D. C.

Nov. 9, 1909.

Gentlemen:

The Bureau of Supplies & Accounts will receive written tenders until 2 o'clock noon, Nov. 13, 1909, for transportation of 2 or 4 cargoes, not less than 4,000 tons each, of coal, from Norfolk, Newport News, Baltimore, or Philadelphia (point of loading at option of Bureau) to either Mare Island or San
167 Francisco.

Offers for vessels of either foreign, or preferably American register, will be considered, each bidder to state, if practicable, in his proposal, the name, capacity, register, and probable date of reporting to load, of such carriers as they may have to offer, and the price per ton for transportation. Total tonnage will be taken in American vessels if price is not excessive (Act of April 28, 1904). Bids must be submitted in U. S. currency.

If vessel is not named in proposal, she must be nominated at least 10 days before loading.

The coal to be New River, Pocahontas, or Georges
168 Creek coal, and to be supplied by the Government.

As deliveries are desired within 60 days, at least two carriers to be ready to load at any time before Dec. 10, 1909, or earlier, if possible, and remainder within 15 days thereafter; but each vessel to give at least 10 days' notice prior to reporting to load. Preference being given to earliest loading dates offered.

Shipment to be made under regular Bureau conditions, of which the following form a part:

(a) Carriers to report for cargo promptly upon date reported, ready for loading. To be loaded with dry coal only; but no expenses to be incurred by the

Government for its inability to supply dry coal if due to weather conditions.

(b) All expenses of delivery of cargoes including loading and port charges, to be paid by the ship. Cargo to be discharged at Government expense, etc.

(c) Government guarantees to discharge cargo at rate of 400 tons per day, except Sundays, legal holidays, etc., in default of which the ship will be paid demurrage at the rate of eight cents per ton per day of the net registered tonnage of each steamer.

(d) Lay days to commence after 24 hours' notice 170
of arrival of ship to Commandant of navy yard concerned, etc.

(e) Cargo to be delivered in good condition alongside wharf or any lighter or vessel where carrier can safely lie afloat, as may be directed by the Commandant.

(f) Vessels to take turn in loading; but will receive Government dispatch in loading.

(g) Freight to be paid by Bureau upon receipt of cable advices from Commandant that vessel is discharged, etc.

The Bureau reserves the right to accept any offer for individual cargoes or for single items, or to ac- 171
cept any bid, or to reject any or all bids, as the interests of the Government might require. Decision will be made before 2 P. M. of date tenders are opened, if practicable.

Mail tender in special envelope endorsed: "Tender for Transportation of Coal to ," and addressed to E. B. ROGERS,
Paymaster General, U. S. N.

172 **Plaintiff's Exhibit 2.**

Cable Address: "Henrolton," New York.
Use Watkins' Code & Appendix.

THE NEW YORK AND PORTO RICO
STEAMSHIP COMPANY,
CHARTERING DEPARTMENT,
No. 12 Broadway,
New York.

New York, Nov. 13th, 1909.

Navy Department,
Bureau of Supplies & Accounts,
Washington, D. C.

173 Gentlemen:

Replying to your letter of November 9th, 1909, we beg to submit the following tender.

1st. For the transportation of two or four cargoes of coal from Norfolk, Newport News, Baltimore or Philadelphia to Mare Island or San Francisco.

2nd. Two (2) steamers to be ready to load previous to December 10th, 1909, (in all probability we will declare a steamer November 15th, that will make prompt loading), and two (2) steamers to load between December 10th and 25th, 1909.

3rd. Rate of freight to be, for the two (2) steamers to be ready to load before December 10th, 1909,

174 *fifty-eight* *$3.58*

—Three Dollars and Sixty-Nine Cents ($3.69) per ton of 2240 lbs., for the two (2) steamers between December 10th and 25th, 1909,—Three Dollars and *thirty-three* *$3.33*

Forty-Four Cents ($3.44) per ton of 2240 lbs.

4th. All other terms to be the same as usual Navy Department conditions for the shipment of coal.

Yours very truly,
RICHARD D. WRIGLEY,
Manager Chartering Department.

*Changes in lines 3 & 6, paragraph 3rd, made by*

*direction of Richard D. Wrigley, Manager Chartering Department New York & Porto Rico Steamship Co., Nov. 13, 1909.*

JAMES H. HAYDEN,
Attorney for New York & Porto Rico Co.

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## Plaintiff's Exhibit 3.

(Official Business.)
(Telegram)

176

110539

NAVY DEPARTMENT.

BUREAU OF SUPPLIES AND ACCOUNTS,
Washington, November 13, 1909.

New York & Porto Rico Steamship Co.,
12 Broadway, New York.

Your offer one steamer December tenth twenty-fifth cancelling and one steamer December twenty-fifth cancelling but for loading on date satisfactory to Bureau accepted at three dollars thirty-three per ton each steamer. Usual Bureau conditions to govern.

E. B. ROGERS.

177

178 **Plaintiff's Exhibit 4.**

Cable address: "Henrolton," New York.
Use Watkins' Code & Appendix.

THE NEW YORK AND PORTO RICO
STEAMSHIP COMPANY,
CHARTERING DEPARTMENT,
No. 12 Broadway,
New York.

New York, November 15th, 1909.

Navy Department,
Bureau of Supplies & Accounts,
Washington, D. C.

179 Gentlemen:

We beg to acknowledge receipt of your telegram of November 13th, accepting our offer of one steamer to make loading at Philadelphia, Baltimore, Norfolk, or Newport News, between December 10th and 25th, and one steamer to report for loading any time previous to December 25th, on date satisfactory to the Department, for Mare Island or San Francisco, at $3.33 per ton, and we will in due course advise you what steamers we will tender on this business.

Yours very truly,
RICHARD D. WRIGLEY,
Manager, Chartering Department.

180

**Plaintiff's Exhibit 5.** 181

Cable Address: "Henrolton," New York,
Use Watkins' Code & Appendix.

THE NEW YORK AND PORTO RICO
STEAMSHIP COMPANY,
CHARTERING DEPARTMENT,
No. 12 Broadway,
New York.

New York, Nov. 18th, 1909.

Navy Department,
Bureau of Supplies & Accounts,
Washington, D. C.

Gentlemen: 182

Confirming conversation over telephone to-day with Paymaster Peoples, we have had offered to us a steamer of 5000 tons, 10% cargo capacity, to load for San Francisco, and, as requested by you, have communicated with Messrs. Berwind-White Coal Mining Company, and they have informed us that they can supply the coal, steamer not to report before the 20th inst., with cancellation the 30th inst., and we are communicating with Owners and will do our utmost to secure her.

Will advise you later whether we are successful or not.

Yours very truly, 183
RICHARD D. WRIGLEY,
Manager Chartering Department.

184 **Plaintiff's Exhibit 6.**

In reply Refer to No. 110539.
N. B. Address all communications to the Bureau.

NAVY DEPARTMENT,
BUREAU OF SUPPLIES AND ACCOUNTS,
Washington, D. C.
November 19, 1909.

Gentlemen:

1. The Bureau notes from your letter of the 18th instant, that you are working on a steamer of 5,000 tons, 10 per cent., to apply on your requisition No. 73 for San Francisco; and it is understood from
185 your telephone communication of the 19th instant that you had not yet closed, but that you had arranged with the Berwind-White Coal Mining Co., which company stated they would be able to load her on time in case she reported before the 20th instant with November 30th cancelling.

2. If the coal suppliers will be able to load her on time, the Bureau will accept her.

By direction of the Paymaster General.

Respectfully,
C. J. PEOPLES,
Paymaster, U. S. Navy,
In Charge of the Contract Section.

186 New York & Porto Rico Steamship Co.,
No. 12 Broadway,
New York, N. Y.

## Plaintiff's Exhibit 7.

187

Cable Address: "Henrolton," New York.
Use Watkins' Code & Appendix.
THE NEW YORK AND PORTO RICO
STEAMSHIP COMPANY,
CHARTERING DEPARTMENT,
No. 12 Broadway,
New York.

New York, November 19th, 1909.

Navy Department,
Bureau of Supplies & Accounts,
Washington, D. C.

Gentlemen:

188

We beg to acknowledge receipt of your favor of November 18th, #110,539—and to note to what Companies we shall report the two steamers that we are to furnish to load for San Francisco or Mare Island, and we will be guided accordingly.

The prompt steamer that we were working on yesterday has not yet been closed, but the boat is still open, and we think there is a good chance of our getting her.

Yours very truly,
*RICHARD D. WRIGLEY,*
Manager Chartering Department.

189

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## Plaintiff's Exhibit 8.

New York, Nov. 23d, 1909.

Navy Department,
Bureau of Supplies & Accounts,
Washington, D. C.

Gentlemen:

We beg to advise you that we have not as yet secured the prompt steamer we were working on under our contract for tonnage to Mare Island or

190 *Plaintiff's Exhibits.*

San Francisco. However, the steamer is all discharged here this afternoon, and there is a good possibility of our being able to close her either tomorrow or next day, and just as soon as we do will advise you immediately. Messrs. Berwind-White Coal Mining Co. are still in position to furnish her with the cargo promptly.

Yours very truly,
RICHARD D. WRIGLEY,
Manager Chartering Department.

191

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**Plaintiff's Exhibit 9.**

New York, Nov. 30, 1909.

Navy Department,
Bureau of Supplies & Accounts,
Washington, D. C.

Gentlemen:

We are very sorry to say that so far we have not been able to secure the steamer we had in view for San Francisco, but, inasmuch as the boat is still here unchartered, there is a possible chance of our
192 securing her, and just as soon as it is decided definitely we will advise you.

Yours very truly,
RICHARD D. WRIGLEY,
Manager Chartering Department.

**Plaintiff's Exhibit 10.** 193

In reply Refer to No. 110539.
N. B. Address all communications to the Bureau.

NAVY DEPARTMENT,
BUREAU OF SUPPLIES AND ACCOUNTS,
Washington, D. C.,
December 9, 1909.

Gentlemen:

Referring to the Bureau's acceptance of the offer contained in your letter of November 13, 1909, for two steamers for San Francisco Harbor which are to be covered by Bureau requisition No. 73 and to subsequent correspondence in connection there- 194
with:

The time for nomination of both of these steamers is drawing to a close, inasmuch as they must be ready to load not later than December 25, 1909, and, according to the conditions, they must be nominated 10 days before. The Bureau expected that one of these steamers would be ready to load about December 10.

Both of these steamers must be nominated not later than the close of business on December 15, 1909, and the Bureau would be very glad if you could nominate one of them at once because the cargoes of coal which these two steamers are to 195
transport to the western coast will be urgently needed by the time the vessels arrive.

The Bureau received a visit from your Mr. Hayden about one week ago, and it was pointed out to him the necessity of your furnishing these steamers on time, and the Bureau trusts that there will be no delay in nominating and having them ready at loading port by the dates specified.

196 *Plaintiff's Exhibits.*

Please telegraph the Bureau upon receipt of this letter as to their status.

By direction of the Paymaster General.

Respectfully,

C. J. PEOPLES,
Paymaster U. S. N.,
In Charge of the Contract Section.

New York & Porto Rico S. S. Co.,
12 Broadway,
New York City.

197

## Plaintiff's Exhibit 11.

December 14, 1909.

Dear Sir:

Confirming what was said in the course of our interview this morning, I beg to say: On November 13th last, the New York & Porto Rico Steamship Company submitted tenders for the transportation of two cargoes of coal from Philadelphia, Baltimore, or Norfolk, to the Mare Island Navy Yard, San Francisco, at $3.58 per ton, the vessels to be nominated on or before December 1st and the
198 cancellation date being December 10th, and two cargoes at $3.33 per ton, the vessels to be nominated December 15th and the cancellation date being December 25th. On November 13th the company was notified by the Purchasing Pay Officer that its tender was accepted for two cargoes at $3.33 per ton, the vessels to be nominated and report for loading in conformity with the tender. When the tender was submitted, the company was in negotiation for the charter of one or more British steamers of suitable capacity. The acceptance of the company's tender became known among

ship owners of this country and England almost as soon as it was communicated to this company as the successful bidder. American and foreign owners then realized that the company had no tonnage with which to fulfill its engagements. We are informed and believe that a combination was made among these owners to prevent the company from chartering tonnage for the December sailings, except at a rate so exorbitant that it would mean a heavy loss. In furtherance of that combination, the offer of British tonnage, that the company had under consideration, was withdrawn by the owners of the vessels in question. Thereafter, the company, though zealous in prosecuting inquiries about, and making offers for, suitable tonnage, was unable to get any. For a time it had a standing offer of $4.00 per ton, being 67c per ton more than the company would have received from the Department under its tender. No tonnage was procurable at that figure and for some days past the company has been considering charters at higher rates. Within the past day or two, one steamer, which would not have been available for December loading, was offered at $4.75 per ton. The company believes that this unprecedented increase in charter rates is the result of the combination mentioned, the intent and purpose of which is to cause it to make default under its engagement to your Department, or else to suffer so heavy a loss that it will desist, in future, from competing with other firms engaged in the business. These are closely identified with foreign ship owners.

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Under the circumstances mentioned, the company is constrained to advise you that it cannot furnish the transportation tendered. In as much as we are advised by you that no extension or postponement of loading can be granted, because the

202 *Plaintiff's Exhibits.*

coal must be delivered at the Mare Island Navy Yard by the middle of February, in order to supply the Pacific fleet, which will call there at that time, we request you to procure the transportation, which this company formally tendered, either by diverting tonnage already under charter to your Department for other ports, or by securing new tonnage in the general market, provided, of course, that such transportation can be secured by the Department by one of those means at a reasonable cost. I respectfully request that, before any
203 contract is closed for the transportation in question, you will have the goodness to advise me of its terms.

Very respectfully yours,
JAMES H. HAYDEN,
Attorney for the New York &
Porto Rico Steamship Company.

Rear Admiral Eustace B. Rogers,
Paymaster General, U. S. N.,
Navy Department.

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204 **Plaintiff's Exhibit 12.**

In reply refer to No. 110539.
NAVY DEPARTMENT,
BUREAU OF SUPPLIES AND ACCOUNTS,
Washington, D. C.
December 16, 1909.

Sir:

1. The Bureau wishes to acknowledge receipt of your letter of the 14th inst; and will advise you at a later date as to the best arrangements which can be made relative to diverting to San Francisco the two steamers now under charter for other

ports, or to obtain or secure these cargoes in the open market.

By direction of the Paymaster General.

C. J. PEOPLES,
Paymaster, U. S. Navy,
In Charge of the Contract Section.

Mr. James H. Hayden,
Bond Building,
Washington, D. C.

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## Plaintiff's Exhibit 13. 206

December 24, 1909.

Re New York & Porto Rico Steamship Co.

Sir:

On November 13, 1909, the Purchasing Paymaster having advertised for tenders for the transportation of certain coal from Philadelphia, Baltimore or Norfolk, to Mare Island, California, tenders for such transportation were submitted to him by a number of firms, including the New York & Porto Rico Steamship Company. Thereafter, this Company was advised that its tender had been accepted for the transportation of two cargoes, the 207 steamers to load at Norfolk on or before December 25th. For reasons which have been given to the Paymaster General and Purchasing Paymaster, the company was unable to furnish this transportation and the Department has provided for it by the diversion of other tonnage, which it had under charter. This diversion involved some considerable expense, and we are advised that the transportation of the coal will cost the government 90 cents per ton more than it would at the rate tendered by the New York & Porto Rico Steamship

208 *Plaintiff's Exhibits.*

Company. The Paymaster General advises me this morning, that he has submitted to you the question of imposing a penalty upon the New York & Porto Rico Steamship Company. In deciding what penalty, if any, is to be charged, a number of points should be considered, and, for the purpose of presenting them properly to you, I beg that you will designate a time when you can hear me upon them. I believe that it will be more satisfactory, both to the Department and the Company, to have present at the hearing the manager of its chartering de-
209 partment, who has conducted the business on its behalf. He is in New York, but will come to Washington for purposes of the hearing, if given an opportunity to do so. I suggest, therefore, that you fix the time of hearing not earlier than Thursday, the 30th instant.

Very respectfully yours,
JAMES H. HAYDEN,
Attorney for The New York &
Porto Rico Steamship Company.

Hon. Beekman Winthrop,
Assistant Secretary of the Navy,
Washington, D. C.

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**Plaintiff's Exhibit 14.**

December 29, 1909.

Sir:

With reference to the question of imposing penalty upon the New York & Porto Rico Steamship Company, which was submitted to you by the Paymaster General on the 23d instant, I beg to say: On November 13, 1909, pursuant to a call theretofore issued by the Purchasing Paymaster, U. S. Navy, tenders were submitted to him for the trans-

portation of four cargoes of coal from Philadelphia, Baltimore, or Norfolk to the Mare Island Navy Yard, San Francisco, California. Among those submitting tenders, was the New York & Porto Rico Steamship Company, which offered to carry two cargoes of coal by steamers of not less than 4,000 tons capacity each, to be nominated on or before December 1st, with a cancellation date of December 10th, at $3.58 per ton; and two cargoes, by steamers of not less than 4,000 tons capacity each, to be nominated December 15th, with cancellation date December 25th, at $3.33 per ton. 212
Immediately after the bids were opened, the company was advised by the Purchasing Paymaster that its tender for transportation of two cargoes, aggregating not less than 8,000 tons, at $3.33 per ton, was accepted, the vessels to be nominated and report for loading in conformity with the terms of the tender. At the time, the company was negotiating with the owners for the charter of one or more British steamers capable of performing the service tendered, at rates somewhat less than $3.33 per ton, but the acceptance of the company's tender became generally known among domestic and foreign ship owners and agents, almost as soon as it was communicated to the New York & Porto 213
Rico Steamship Company, as the successful bidder. The owners of the British vessels, for which the company had been negotiating, realized at once that it had no tonnage under charter, with which it could provide the transportation tendered to the Navy Department, and they straightway terminated the negotiations. This company is advised and has every reason to believe that they and other owners of foreign steamers entered into a combination to increase the charges for their tonnage to such an extent that it would either inflict very

heavy loss upon the New York & Porto Rico Steamship Company, or else compel it to make default and, consequently, prevent it from being a competitor for future contracts of the Navy Department. Thereafter, although the company was diligent in seeking to find and charter suitable vessels, it could get none. It was willing to suffer a considerable loss, and, for some days prior to December 15th, made a firm offer of $4 per ton. The best terms that it was able to secure were $4.75 per ton for a vessel which would not have been
215 available for loading until the early part of January, 1910. Under these circumstances, the company, on December 14th, after conferring with the Purchasing Paymaster, directed a letter to the Paymaster General, advising him that it could not furnish the transportation tendered, and, being advised that the urgency for transportation of coal to Mare Island was such that no extension or postponement of loading dates could be granted, requested him to provide for the transportation covered by the company's tender, either by diverting tonnage already under charter to the Navy Department for other ports, or by securing new tonnage
216 in the general market; *Provided, however*, that the tonnage desired could be obtained in one of these ways, at a reasonable cost. The Purchasing Paymaster immediately entered into negotiations for the diversion to Mare Island of tonnage that he then had under charter for Cavite and Honolulu, and, furthermore, in order to meet an unexpected demand for coal at Mare Island, involving the transportation of two or more cargoes, in addition to those covered by the New York & Porto Rico Steamship Company's tender, issued a general call for bids to be opened December 18th. In response to that call other eight tenders were submitted,

seven for January loadings and one for a March loading, the rates ranging from $4.49 to $8. Some of these were for the diversion to San Francisco of tonnage already under charter for other ports at $3.50 or less. We are advised that all of these were rejected by the Purchasing Paymaster as excessive, and that he has since arranged for the diversion to San Francisco of two steamers, having an aggregate capacity of more than 11,000 tons, at $4.23 per ton, or 90 cents more than the rate tendered by this company.

The question presented to you is: What penalty, 218
if any, shall be imposed upon the company for its failure to supply tonnage in conformity with its tender? It wishes, if possible, to make an amicable settlement of this matter, and one which, the circumstances considered, will be satisfactory to the Department. In arriving at the terms of settlement, there are three things that should be considered: (1) There was, in law, no contract between the Department and the New York & Porto Rico Steamship Company, and, hence, no breach of contract, and therefore no legal obligation of the company to pay the government anything by way of penalty or damages. (2) In view of the circum- 219
stances attending the transaction, and especially the practice of the Department in similar transactions with other shipping firms, the New York & Porto Rico Steamship Company should be relieved from penalty, if, indeed, it were liable for any. (3) If the company were liable for any penalty, and the Department should see fit to enforce it, its amount would be limited by the minimum tonnage that the company could have furnished under its tender, and the difference between the actual cost of the transportation ($4.23 per ton) and the rate tendered by the company ($3.33 per ton). These points will be reviewed in their order.

220 *Plaintiff's Exhibits.*

I.

There was, in law, no contract between the Department and the New York & Porto Rico Steamship Company, and, of necessity, no breach of contract, and, of course, no legal obligation of the company to pay the government anything by way of penalty or damages.

Section 3744, U. S. Revised Statutes, provides:

"It shall be the duty of the Secretary of
221 War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, *to be reduced to writing, and signed by the contracting parties with their names at the end thereof;* a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, or proposals to him made by
222 persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return."

This has been drawn in question in a very considerable number of cases in which, at the instance of the United States, it has been interpreted uniformly and consistently as a statute of frauds, to

the effect that no transaction of the War, Navy or Interior Departments shall constitute a valid contract *"until reduced to writing and signed by the parties with their names at the end thereof."*

*Clark v. United States,* 95 U. S., 539, is the leading case on this subject. Clark brought suit in the Court of Claims for the value of his steamer, lost while in the service of the government, and for her use for a period of eight days prior to the loss. It appeared that an officer of the Quartermaster's Department of the Army entered into an oral agreement, with the approval of the General commanding the Division of Texas, by which it was provided 224
that the Department would pay Clark $150 a da, for the use of the steamer, but no formal contract was to be entered into, pending a trial of the steamer to prove her ability to perform the service desired by the government. It was, however, agreed orally that the Department would pay for her use while on the trial trip, at the rate named, and, if she were lost while making the trip, it would pay her owner her value, to be appraised by three disinterested persons. Clark delivered the steamer to the Quartermaster's Department. The Quartermaster put his own captain and crew on board the 225
vessel, and she proceeded upon the voyage which was to be her trial trip, and, after being in the service of the government for eight days, was wrecked and became a total loss. Three disinterested persons were then agreed upon, and requested by the officer of the Quartermaster's Department and Clark to appraise the value of the vessel, which they did, finding the same to be $60,000. It appeared from evidence adduced at the trial, that the appraisal was reasonable. Thereafter, the government refused to pay Clark anything, either for the vessel or her use. At the trial, the govern-

226 *Plaintiff's Exhibits.*

ment contended that, in as much as the agreement between Clark and the Quartermaster's Department had not been reduced to writing, as provided by the statute (*supra*), there was no valid contract. The Court of Claims adopted that view, and dismissed Clark's petition. On appeal, the Supreme Court held that Clark was entitled to recover, as upon a *quantum meruit*, irrespective of the agreement between him and the Quartermaster's Department, reasonable compensation for the use of his vessel which the government had made up
227 to the time of her loss. But, with respect to the claim for her loss, which necessarily depended upon the existence of a valid contract with the Quartermaster's Department, and for which no *quantum meruit* would lie, the judgment of the Court of Claims was affirmed. Mr. Justice Bradley, delivering the opinion, said:

> "It is contended on the part of the Government that this Act is mandatory and binding, both on the officers making contracts and on the parties contracting with them; whilst the claimant insists that it is merely directory to
> 228 the officers of the Government, and cannot affect the validity of contracts actually made, though not in writing. The Court of Claims has heretofore held the Act to be mandatory, and as requiring all contracts made with the Departments named to be in conformity with it. The arguments by which this view has been enforced by that court are of great weight and, in our judgment, conclusive. The facility with which the Government might be pillaged by the presentment of claims of the most extraordinary character, if allowed to be sustained by parol evidence, which can always be

produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the Government should be in writing. Perhaps the primary object of the statute was to impose a restraint upon the officers themselves and prevent them from making reckless engagements for the Government; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this. And we think that the statute in question was intended to operate as such. 230 It makes it unlawful for contracting officers to make contracts in any other way than by a writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of opinion, therefore, that the contract itself is affected and must conform to the requirements of the sta- 231 tute, until it passes from the observation and control of the party who enters into it. After that, if the officer fails to follow the further directions of the Act with regard to affixing his affidavit and returning a copy of the contract to the proper office, the party is not responsible for this neglect."

*South Boston Iron Co. v. U. S.*, 118 U. S., 37. This was a suit by the Iron Company to recover $75,000 damages and $143,264.06 prospective profits, claimed by reason of alleged breach of con-

232 *Plaintiff's Exhibits.*

tract. To establish such a contract, the company produced correspondence which had passed between it and the Chief of the Bureau of Steam Engineering, Navy Department, acting with the approval of the Secretary of the Navy, in which appeared the tender by the company of certain materials, to be made in conformity with certain plans and specifications, an acceptance of the tender by the Navy Department, and, in short, everything essential to the establishment of a valid contract between individuals, but which did not literally meet the re-
233 quirement that the agreement should be reduced to writing and signed by the parties with their names at the end thereof. Following the Clark case (*supra*), the Court, after referring to the statute (Sec. 3744 R. S. U. S.) said:

> "An effort has been made in this case to show a contract in writing, but we concur entirely with the Court of Claims that the papers relied on for that purpose are nothing more, in law or in fact, than the preliminary memoranda made by the parties for use in preparing a contract for execution in the form
> 234 required by law. This was never done, and, therefore, the United States never became bound. Within a few days after the memoranda were made, the whole matter was abandoned by the Department and the Iron Company has never performed any of the work referred to, nor has it ever been called upon to do so."

To the same effect is *Monroe v. U. S.*, 184 U. S., 524; *St. Louis Hay & Grain Co. v. U. S.*, 191 U. S., 159:

> "Although no doubt both parties supposed their agreement binding, the Court of Claims

held, and it is not disputed, that the contract was within Revised Statutes, Sec. 3744, and not having been 'reduced to writing and signed by the contracting parties with their names at the end thereof,' could not have been sued upon, if it had not been performed."

*McLaughlin v. U. S.*, 37 Ct. Cls., 150, 185, where the Court, after referring to Section 3744 of the Revised Statutes, said:

"This statute is mandatory. Operative as 236
a statute of frauds, it makes contracts not reduced to writing and signed by the parties *void*. The preliminary advertisement, specifications, proposals and acceptance of proposals must be viewed as becoming a part of the statutory contract when the contract is executed as required by statute, but, until then, only the negotiations necessary to the execution of a formal contract. The exception noted in the books of a parol contract wholly or partly executed on one side entitling the party performing to recover the fair value of his property or services as upon an implied contract for 237
a *quantum meruit* has no application here."

*St. Louis Hay & Grain Co. v. U. S.*, 37 Ct. Cls., 281, 291.

*U. S. ex rel. International Contracting Co. v. Lamont*, 2 App. D. C., 532, 545-547.

It will be observed that, while it appears in all of these cases, except that of the St. Louis Hay & Grain Co., that the statute was invoked, and the existence of a valid contract was denied, by the government,

238 *Plaintiff's Exhibits.*

and the decisions of the court were in favor of the government on that question, and while the court rejected the claimant's plea of the statute in the St. Louis Hay & Grain Company's case, on the ground that the transaction there considered was fully executed by the transfer of property and payment, it must be noted that the statute does not in terms, nor have the courts ever intimated that it was intended to operate exclusively for the benefit of the government, making the bidder liable for performance of the matter tendered by him, and, at the
239 same time, leaving the government free to repudiate the bargain, until such time as its agent might see fit to comply with the requirement of the statute by affixing his name to a contract. In saying, as the courts have done, that, until an agreement has been reduced to writing and executed in the manner prescribed by the statute, it is "void" and not subject to be sued upon, it is clearly meant that, in contemplation of law, it has no existence for any purpose, and cannot be enforced, either by the bidder or the government.

II.

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In view of the circumstances attending the transaction, and especially the practice of the Department in similar transactions with other shipping firms, the New York & Porto Rico Steamship Company should be relieved from penalty, if, indeed, it were liable for any.

If, indeed, the New York & Porto Rico Steamship Company were legally liable for penalty in this transaction, it would be within the discretion of the Secretary of the Navy to waive it. Heretofore, I have shown that the company encountered extraordinary and wholly unexpected difficulty in pro-

curing the tonnage contemplated by its tender. This was due to no negligence on its part, nor even to its unwillingness to take a reasonable loss on the transaction, in order that it might keep faith with the Department. In short, it would have been willing to take a loss of 67 cents per ton, in order to do so. That is evidenced by the firm offer of $4 per ton, which it had outstanding for several days prior to December 15th, and which was made when the company learned of the government's urgent need of transportation, and that the necessities of the naval service could not be met if the 242
sailings tendered for December were postponed until January. The company firmly believes, and the facts, we think, ought to be sufficient to convince the Department, that there must have been a combination of ship owners, made for the purpose of extorting exorbitant rates from the company, or else to force it into the position of a defaulter, and thereafter exclude it from competition for Navy Department business. When the company made the tender, it was, as already stated, in negotiation for foreign vessels with which it could furnish transportation in the event of the acceptance of its tender. For some time after the tender was 243
made, it had no knowledge of the urgency of the government's need for transportation in this particular case, and, hence, had no reason for supposing that, upon its showing reasonable diligence in the matter, the Bureau could not extend its time for nominating vessels and reporting them for loading. On earlier occasions, such extensions had been granted to Lind & Company, the Baker Transportation Company, and Hasler, Leitch & Company. The company does not wish to be understood as complaining of the conduct of the Department in this matter. It appreciates that, in view of the

244 *Plaintiff's Exhibits.*

urgent need of the United States for the transportation of coal to Mare Island, in this particular instance no extension could have been given. It appreciates also the endeavors made by the Purchasing Paymaster to secure tonnage to take the place of that tendered by the company, after being notified by the company that it could not perform its tender. I submit that these circumstances warrant the exercise of executive clemency, and would justify the remission of penalty.

245 III.

If the company were liable for any penalty, and the Department should see fit to enforce it, its amount would be limited by the minimum tonnage that the company could have furnished under its tender and the difference between the actual cost of the transportation ($4.23 per ton), and the rate tendered by the company ($3.33 per ton).

By its tenders submitted to the Purchasing Paymaster on November 13, 1909, the company offered to provide two steamers of not less than 4,000 tons
246 each. It was not made optional with the Department to stipulate for anything above that minimum. The company could have fulfilled its offer by providing two steamers of exactly 4,000 tons each, and therefore having an aggregate tonnage of 8,000. I submit, therefore, that it would be unreasonable, in computing the amount of penalty, assuming that any will be imposed or could be enforced, to base it upon a greater tonnage than 8,000. Again, it appears that, by the two steamers which the Bureau has succeeded in diverting to San Francisco, the 8,000 tons of coal, which the New York & Porto Rico

Steamship Company offered to carry, will be carried at 90 cents per ton more than the rate tendered by it. Therefore, in no case, could the penalty exceed $7,200.

The practice of the Bureau with respect to requiring bonds along with tenders and of reducing contracts to writing, in the manner contemplated by Section 3744 R. S., has been somewhat lax. Doubtless the necessities of this particular form of business have rendered such observances impossible or inconvenient. It appears that the Bureau and the shipping firms have relied upon mutual good 248
faith in the transactions and recognition by each party of obligations not legally enforceable. It is the wish of this company to keep faith with the Department, although it appreciates that, if the positions were exchanged, that is, if it were prepared to deliver tonnage tendered and accepted, but the Department, with proper regard for the best interests of the government, felt obliged to decline that tonnage, the statute would leave no course open to the Department or the courts but to reject the company's claim for any damage to which it might have been put by chartering tonnage to fill its accepted tender. We trust that you will bear this 249
situation in mind in proposing the terms of settlement.

Very respectfully,
JAMES H. HAYDEN,
Attorney for The New York &
Porto Rico Steamship Company.

Hon. Beekman Winthrop,
Assistant Secretary of the Navy.

250 **Plaintiff's Exhibit 15.**

*Circular calling for tenders to replace the tonnage on which default was made, to be opened Dec.* 18, 1909.

All Bids Cancelled. See List Attached.

NAVY DEPARTMENT

BUREAU OF SUPPLIES AND ACCOUNTS.

Washington, D. C.

December 14, 1909.

Gentlemen:

The Bureau of Supplies and Accounts will receive
251 written tenders until 12 o'clock noon, December 18, 1909, for transportation of 2 or 4 cargoes, not less than 4,000 tons each, of coal, from Norfolk, Newport News or Baltimore (point of loading at option of Bureau) to either Mare Island, San Francisco, or Honolulu, vessel to stop at Punta Arenas for orders regarding destination.

Offers for vessels of either foreign, or preferably American register, will be considered, each bidder to state, if practicable, in his proposal, the name, capacity, register, and probable date of reporting to load, of such carriers as they may have to offer, and the price per ton for transportation. Total tonnage
252 will be taken in American vessels if price is not excessive (Act of April 28, 1904). Bids must be submitted in U. S. Currency.

If vessel is not named in proposal, she must be nominated at least 10 days before loading.

The coal to be New River, Pocahontas, or Georges Creek coal, and to be supplied by the Government.

As deliveries are desired within 60 days, at least two carriers to be ready to load at any time before or earlier, if possible, and remainder within 15 days thereafter, but each vessel to give at least 10 days' notice prior to reporting to

load. Preference being given to earliest loading dates offered.

Shipment to be made under regular Bureau conditions, of which the following form a part:

(a) Steamers to report for cargo promptly upon date reported, ready for loading. To be loaded with dry coal only; but no expenses to be incurred by the Government for its inability to supply dry coal if due to weather conditions.

(b) All expenses of delivery of cargo, including loading and port charges, to be paid by the ship. Cargo to be discharged at Government expense, etc.

(c) Government guarantees to discharge cargo at rate of 400 tons per day, except Sundays, legal holidays, etc., in default of which the ship will be paid demurrage at the rate of eight cents per ton per day of the net registerd tonnage of each steamer.

(d) Lay days to commence after 24 hours' notice of arrival of ship to Commandant, Naval Station, concerned.

(e) Cargo to be delivered in good condition alongside wharf or any lighter or vessel where the carrier can safely lie afloat, as may be directed by the Commandant.

(f) Freight to be paid by Bureau upon receipt of cable advices from Commandant that vessel is discharged.

(g) Vessels to take turn in loading; but will receive Government dispatch in loading.

The Bureau reserves the right to accept any offer for individual cargoes or for single items, or to accept any bid or to reject any or all bids, as the interests of the Government might require. Decision will be made before 2 P. M. of date tenders are opened, if practicable. Mail tender in special

envelope endorsed: "Tender for Transportation of Coal," and addressed to:

E. B. ROGERS,
Paymaster General, U. S. N.

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## Plaintiff's Exhibit 16.

NAVY DEPARTMENT,
BUREAU OF SUPPLIES AND ACCOUNTS.
Washington, D. C.

Bids received December 18, 1909.

| | Honolulu | Mare Island or San Francisco | No. of steamers | Reporting dates |
|---|---|---|---|---|
| J. H. Winchester & Co. | $5.00 | $6.00 | 1 | Jan. 5/15, '10 |
| Benham & Boyesen | 5.63 | 4.93 | 1 | " 10 cancellin |
| Benham & Boyesen | 5.43 | 4.78 | 1 | " 25 " |
| Tweedie Trading Co. | 7.90 | 7.90 | 4 | |
| Edgar F. Luckenback | | 8.00 | 1 | Mar. 1, 1910 |
| Barber & Co. | 5.50 | 5.10 | 2 or 4 cargoes. | |
| American Transportation Co. | 4.49 | 4.49 | 2 cargoes Jan. 25 | |
| McCall Dinning Co. | 5.50 | 5.00 | 1 Jan. 5, cancelling | |
| Howard Houlder Partners | | 4.45 | 1 To divert to | |

**Plaintiff's Exhibit 17.** 259

NAVY DEPARTMENT,
BUREAU SUPPLIES & ACCOUNTS.
109633

December 18, 1909.

Gentlemen:

The Bureau confirms its long distance telephonic conversation of about 1:30 P. M., today to the following effect: That your offer to divert the steamship Falls of Orchy with 6,000 tons of coal on board, now at Honolulu, and the S. S. Earl of Elgin with 5,388 tons cargo, due at Honolulu within the next few days, from that port to San Francisco Bay, is 260 accepted at 85 cents per ton.

The Falls of Orchy is to discharge at the Navy Yard, Mare Island, and the Earl of Elgin at the Naval Coal Depot, California City Point, Cal. This diversion is to be accomplished at an additional charge of 85 cents per ton to the original rate of $3.38 per ton, making a total of $4.23 per ton.

All other conditions of the contract covering Bureau Requisition No. 47 to govern. That contract will be amended by supplemental agreement which will be forwarded you by the Purchasing Pay Officer, Navy Pay Office, New York City. The only changes to be made will be to cover the diversion of 261 each of the steamers mentioned to the ports named, at a total cost of $4.23 per gross ton.

The Commandant, Navy Yard, Mare Island, Cal., has been given telegraphic instructions to direct the Master of the Falls of Orchy, immediately upon his arrival at San Francisco Bay, to proceed to Mare Island for discharge, and also, in the case of

262 *Plaintiff's Exhibits.*

the Earl of Elgin, to California City Point.
By direction of the Paymaster General,
Respectfully,
C. J. P.,
Paymaster, U. S. N.
In Charge of Contract Section.
Baker Transportation Co.,
29 Broadway, New York City.

---

263 **Plaintiff's Exhibit 18.**

CABLEGRAM

427 nytn 11336pm 7 U. S. G.
Honolulu, Dec. 20-09.
Busup, Washington.
Orchy Mare Island perhausero (December 20th) perusinum (Monday 3 P. M.)
REES.

The translation of said telegram is as follows:
Orchy sailed for Mare Island December 20 Monday at 3 p. m.

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264 **Plaintiff's Exhibit 19.**

CABLEGRAM

469 ny ox 8usg 1141 pm
Honolulu, Dec. 28-09
Busup,
Washington.
Earlelgin california city perhiemabo (dec. 28) perzikboom (Tuesday 1 p. m.)
REES.

The translation of said telegram is as follows:
The Earl of Elgin sailed December 28 Tuesday at 9 A. M.

**Plaintiff's Exhibit 20.** 265

NAVY PAY OFFICE.

New York, December 21, 1909.

Gentlemen:

Referring to contract No. 92, dated August 31, 1909, and based on Supplies and Accounts Bureau requisition No. 47:

1. The Bureau of Supplies and Accounts states that it has found it necessary to divert two of the steamers which served under the above contract, viz: The Falls of Orchy and Earl of Elgin, from Honolulu to Mare Island and California City Point, Cal., respectfully, for discharge. 266

2. The bureau therefore directs this office to amend the items of said contract as follows:

Paragraph 1. Insert after "Honolulu," in the last line, the words "or one steamer (Falls of Orchy), to the Navy Yard, Mare Island, Cal., and one steamer (Earl of Elgin) to the Naval Coal Depot, California City Point, at 85 cents per ton additional to the rate of $3.83 per ton, which is to apply in the case of vessels discharging at 'Honolulu,' making the total estimated cost $121,219.80."

Paragraph 5. Insert in the fourth line, after the word "Honolulu," the words, "the cargo of the Falls of Orchy to the Commandant, Navy Yard, Mare 267 Island, Cal., and the cargo of the Earl of Elgin to the Inspector in Charge, Naval Coal Depot, California City Point, Cal.," and add, after the word "discharge" in the last line, the words, "and the Falls of Orchy and Earl of Elgin, upon their arrival at Honolulu, will proceed at once to San Francisco, the former reporting arrival to the Commandant, the latter to the Inspector in Charge at California City Point, or their accredited representatives, and be subject to their orders in the matter of discharge."

Paragraph 8. After the word "Honolulu" in the

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3rd line, insert "or to the Commandant, Navy Yard, Mare Island, or Inspector in Charge, California City Point, Cal., as the case may be."

Paragraph 9. After the word "Honolulu" insert "by the Commandant, Navy Yard, Mare Island, Cal., or the Inspector in Charge, California City Point, Cal., as the case may be."

Paragraph 10. Insert after "Honolulu" in the 2nd line, "or the Commandant, Navy Yard, Mare Island, Cal., or Inspector in Charge, California City Point, as the case may be."

269 All other conditions and requirements of original contract to apply.

3. It is understood that the amendment as above is satisfactory to you. Please furnish this office by return mail with a statement to that effect.

Respectfully,

J. A. Mudd,

Pay Inspector, U. S. N.,

Baker Transportation Co.,
No. 29 Broadway,
New York, N. Y.

## Plaintiff's Exhibit 21.

270

BAKER TRANSPORTATION CO.,
29 Broadway,
New York, N. Y., Dec. 23, 1909.

Sir:

Referring to your letter of the 21st instant, the present is to advise that the amendment to contract No. 92, requisition No. 47, Bureau of Supplies and Accounts, is satisfactory to us.

Respectfully,

BAKER TRANSPORTATION CO.

Per de Veaux Powel,

Treasurer.

## Defendant's Exhibit A. 271

NAVY DEPARTMENT,
BUREAU OF SUPPLIES AND ACCOUNTS,
Washington, D. C.

1st Indorsement. No. 1105371. November 16, 1909.

SUBJECT: Bureau Requisition No. 71, for transportation of one cargo of coal from Atlantic range ports to San Francisco Bay, the order to be placed with Benham & Boyesen of New York City at $3.22 per ton.

Respectfully forwarded to the Department.

1. Upon request of the Bureau of Navigation that arrangements be made to transport about 30,000 tons of coal to California City Point or to the Navy Yard, Mare Island, Cal., in order to replenish stock at those two points by reason of unexpected issues and to provide coal for the Pacific Fleet upon its return to San Francisco Bay in February, 1910, the Bureau invited competition for this service by means of circular advertisements to all shipping firms, owners, agents, etc., and bids were publicly opened at 12 noon November 13, 1909, with the following result: 272

| | | Steamers | Loading | |
|---|---|---|---|---|
| American Trans Co. | $3.66 | 2 | Dec. 10 | 273 |
| American Trans. Co. | 3.66 | 2 | " 25 | |
| Barber & Company | 3 90 | as speci. | | |
| Benham & Boyesen | 3.22 | 1 | Dec. 25 | |
| Bowing & Company | 4.25 | 1 | Nov. 28 | |
| Hasler, Leitch & Co. | 3.20 | 1 | Dec. 25 | |
| Howard, Houlder & Part | 3.95 | 1 | Dec. 10 | |
| Howard, Houlder & Part | 3.75 | 1 | Dec. 20 | |
| Howard, Houlder & Part | 3.55 | 2 | Dec. 30 | |
| Lind & Company | 3.85 | as speci. | | |
| N. Y. & Porto Rico SS Co. | 3.58 | 2 | Dec. 10 | |
| N. Y. & Porto Rico SS Co. | 3.33 | 2 | Dec. 25 | |
| Funch Edye & Company | 3.50 | 1 | Dec. 31 | |
| United States Ship Co. | 3.75 | 2 | Dec. 10 | |
| United States Ship Co. | 3.50 | 2 | Dec. 25 | |
| United States Ship Co. | 3.75 | (1 str. divert from Manilla to San Francisco.) | | |

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2. The lowest bidders were Benham & Boyesen for one steamer at $3.22 per ton; Hasler, Leitch & Co. for one steamer at $3.20 per ton; and the New York & Porto Rico S. S. Co. for two steamers at $3.33 per ton; and the quotation from each of these firms was accepted, making four steamers in all.

3. The attached requisition is to cover the contract with Benham & Boyesen for one steamer at $3.22 per ton; and authority is requested to approve the attached requisition for contract to be entered into with this firm by the Purchasing Pay
275 Officer, Navy Pay Office, New York, N. Y.

E. B. ROGERS,
Paymaster General, U. S. N.

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## Defendant's Exhibit B.

NAVY DEPARTMENT,
Bureau of Supplies and Accounts.

109633
December 13, 1909.

Gentlemen:

276 1. Referring to Requisition No. 47, covering six cargoes for the Naval Station, Honolulu:

The four vessels yet to arrive are due at destination—all of them—sometime between December 29, 1909, and January 7, 1910; and inasmuch as one of these vessels, the Earl of Elgin, will not be entitled to demurrage if there is any delay in unloading, the Bureau will consider a proposition from you toward diverting her for discharge at the Naval Coal Depot, California City Point, San Francisco harbor.

2. It may be that the owners would prefer to

have another steamer, say the Masunda, discharge at either San Francisco or at Mare Island; and as the Bureau would prefer to have two cargoes discharge at the coal depots, California City Point or Mare Island, it will consider a proposition from you for diverting them from Honolulu, all conditions of the original contract to govern.

3. You are requested to please advise the Bureau at as early a date as possible as to whether you could make such arrangement.

By direction of the Paymaster General.

Respectfully, 278

C. J. PEOPLES,
Paymaster, U. S. Navy,
In Charge of the Contract Section.

Baker Transportation Co.,
29 Broadway,
New York, N. Y.

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## Defendant's Exhibit C.

*Memorandum Amending the Specifications of Navy Pay Office Contract No. 92, Dated August 31, 1909, with Baker Transportation Company.* 279

Amend the terms of this contract as noted:.

Paragraph 1: Insert after "Honolulu" in the last line, the words "or one steamer (Falls of Orchy) to the Navy Yard, Mare Island, Cal., and one steamer (Earl of Elgin) to the Naval Coal Depot, California City Point, at 85 cents per ton additional to the rate of $3.38 per ton which is to apply in the case of vessels discharging at Hono-

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lulu," making the total estimated cost $121,219.80.

Paragraph 5: Insert in the fourth line after the word "Honolulu," the words "the cargo of the Falls of Orchy to the Commandant, Navy Yard, Mare Island, Cal., and the cargo of the Earl of Elgin to the Inspector in Charge, Naval Coal Depot, California City Point, Cal.," and add after the word "discharge" in the last line the words "and the Falls of Orchy and Earl of Elgin upon their arrival at Honolulu, will proceed at once to San Francisco, the former reporting arrival to the
281 Commandant, the latter to the Inspector in Charge at California City, or their accredited representatives, and be subject to their orders in the matter of discharge."

Paragraph 8: After the word "Honolulu" in the 3rd line, insert "or to the Commandant, Navy Yard, Mare Island, or Inspector in Charge, California City Point, Cal., as the case may be."

Paragraph 9: After the word "Honolulu" insert "by the Commandant, Navy Yard, Mare Island, Cal., or Inspector in Charge, California City Point, Cal., as the case may be."

Paragraph 10: Insert after "Honolulu" in the
282 2nd line "or the Commandant, Navy Yard, Mare Island, Cal., or Inspector in Charge, California City Point, as the case may be."

All other conditions and requirements of the original contract to apply.

(Stamped): Department of the Interior. Returns Office, Rec'd Dec. 27, 1909, Ack'd Series Navy Dept.

**Defendant's Exhibit D.** 283

Bidders please read conditions carefully and conform to instructions printed on the back of this form.

S. and A. Form No. 101.

Letters on this subject should refer to
Requisition No. 73
Bureau S. & A.
Case No. .....

PROPOSAL FOR SUPPLIES OR SERVICES.

U. S. NAVY PAY OFFICE,
Washington, D. C.,
Dec. 9, 1909. 284

Indorse on Envelope
"Proposal."
"Date of Opening, ....., 19 ."
New York & Porto Rico Steamship Co.,
12 Bdwy, N. Y.
J. H. Hayden, Atty.,
Bond Bldg.,
City.

Please return this proposal *in duplicate* duly signed, by 12 o'clock noon, at once, with prices entered opposite each item named below, for delivery, free of charge, as specified below, within as soon as possible days from receipt of order subject to the conditions printed on the back of this form. 285

Respectfully,
J. N. SPEEL,
Pay Director, U. S. N.

Bids to be considered must show unit prices, extensions, and total amount of bid.

1. Transportation of two cargoes—about 12,000 tons, 10% more, or less, of 2240 lbs. to the ton—of New River, Pocahontas or Georges Creek coal, from Newport News, Sewall's Point, Lambert's Point, Va., Baltimore, Md., or Philadelphia, Penna.,

286 *Defendant's Exhibits.*

(point of shipment at Bureau's option) to the Navy Yard, Mare Island, Cal., or to the U. S. Naval Coal Depot, California City Point, Cal. (final destination to be declared by the Bureau upon arrival of each vessel in San Francisco harbor).

2. It is hereby stipulated and agreed that shipment will be made in two steamers of foreign register, to be nominated hereafter at least ten days prior to the limit of time stated in paragraph 3 below for loading, and under the following conditions:

287 3. That one vessel shall be ready to load about December 10, 1909, December 25, 1909, cancelling; the other to be ready to load at any time prior to December 25, 1909 (which time shall be satisfactory to the Bureau), with December 25, 1909, cancelling. At least ten days' readiness to load must be given in each case before vessels report for cargo and the coal in each instance to be furnished by the Government.

4. That dry coal only will be loaded by the Government and that no damages, demurrage, or other expenses whatever shall be incurred by the Government for its inability, or that of its suppliers,
288 to supply dry coal, if such inability be due to weather or other conditions beyond control. The Government, however, reserves the option of waiving dry coal, if circumstances render such action necessary.

5. That each ship nominated will be consigned for loading to the suppliers, to be hereafter designated by the Bureau of Supplies & Accounts, for supplying the coal at the point of loading, also to be hereafter designated, and the cargo of each steamer to be consigned to the Commandant, Navy Yard, Mare Island, Cal., or Inspector in Charge, U. S. Navy Coal Depot, California City Point, Cal.

Government dispatch to be given each steamer, but each steamer must take its turn with other ships loading for the Government at the same time and at the same port, and, when loaded, to sail immediately for San Francisco harbor, Cal., where final destination will be declared by the Bureau. On arrival at destination, the master shall report said arrival to the Commandant or the Inspector in Charge, as the case may be, and shall be subject to his orders in the matter of discharge.

Q. That all expenses of loading and delivery of each cargo, including port charges and all other 290
charges, except the expense of Govt. inspection at point of loading, to be borne by the ships—the Government to pay all expenses of discharge, it being understood and agreed that all the ship's appliances and attendant expenses, including winchmen, shall be given at the ship's expense, to assist in discharging.

7. That the Government guarantees to discharge each cargo at a minimum average rate of 400 tons per day, excepting Sundays and legal holidays, days upon which work is not required by the customs of the port, and days or parts of days when
discharge is prevented by stress of weather. Fail- 291
ing to discharge at the above guaranteed rate, the Government will pay demurrage at the rate of eight cents per ton per day on the net registered tonnage (as per British Lloyd's of date of charter) of each ship, if such failure is due to any fault of the Government.

8. That lay days shall not commence until the expiration of 24 hours' notice of arrival of each ship has been given by the master thereof to the Commandant, Mare Island, Cal., or Inspector in Charge, California City Point, Cal., as the case

292 *Defendant's Exhibits.*

may be. The Government, however, reserves the right to commence discharge as early after the arrival of each ship as may be practicable, and any coal discharged prior to the 24 hours' notice of arrival to be considered as discharged after the expiration thereof, the Government reserving the right to increase the daily rate of discharge as many tons in excess of the quantity stipulated in paragraph 7 hereof as may be found practicable.

9. That each cargo shall be delivered in good condition alongside the wharf or alongside any
293 lighter or vessel where carrier can safely lie afloat, as may be directed by the Commandant, Mare Island, Cal., or Inspector in Charge, California City Point, Cal., as the case may be.

10. That freight shall be paid by vouchers prepared at the Department upon receipt of telegraphic advice from the Commandant, Mare Island, Cal., or Inspector in Charge, California City Point, Cal., of the quantity discharged, and only for the quantity certified to have been received; but, under no circumstances shall payment be made for any quantity in excess of the bill of lading weight—the contractors, upon completion of load-
294 ing each cargo to furnish the Bureau with three copies of bills of lading of each cargo, together with dealers' bills in duplicate, for said freight, which bills shall contain the following certification, "Certified correct and just; payment not received."

11. That if, upon discharge of each cargo, the quantity of coal discharged should fall short 1% or less from the bill of lading weight, such shortage may be disregarded by the Government and payment made on the bill of lading weight. If, however, this shortage exceed 1%, the excess shall be paid for by the ship (contractor) at the

rate per ton of bunker coal at point and time of loading, the amount to be deducted before payment is made for freight, the Government reserving the option of demanding payment for any shortage that may appear or of allowing for all shortage without deducting its value, if circumstances so warrant.

12. That should disaster or other cause necessitate any vessel putting into any port and discharging all or any part of her cargo and disposing of it by sale or otherwise, it is agreed that such part of cargo as may be necessary to dispose of shall be 296 delivered to the U. S. Government representative at that port (at option of the Bureau of Supplies & Accounts) to be disposed of in such manner as he may be directed by the U. S. Government. All moneys resulting from such disposal to be received, and all disbursements against cargo to be made by him; the balance, if any remain, to be remitted to the United States Government, as may be directed, ship to have option of continuing the voyage or of trans-shipping cargo to destination. No pro rata freight to be paid the ship.

13. That the Government is exempt from any liability that may be incurred by any vessel serv- 297 ing under this contract for its (Government) failure, or that of its agent or agents, to carry out the terms of any charter party existing between the contractors, acting as brokers or agents of said vessel, and the owners thereof, except in so far as the terms of said charter party are in harmony with all other requirements of this contract.

14. That under no circumstances will use be made of the Clayton method, or any other method of extinguishing fires in cargo, unless it be shown to the satisfaction of the master of the ship that its use is necessitated by the actual presence of

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fire in the cargo of coal at the time of using.

15. That the master of each steamer will furnish the Hydrographic office with pilot charts of the various oceans, notices to mariners, Hydrographic bulletins and reports of hydrographic information up to the date of sailing, and with blank form for recording observations, and he is required in turn to make and transmit to the Hydrographic office such observations of nautical and hydrographic value as are called for by said forms. It is understood that for such observations made and trans-
299 mitted, the Hydrographic office will in turn furnish the master with the observation of voluntary observers all over the world, as recorded in the publications above mentioned, this arrangement giving mutual benefit in the improvement of the safety of navigation. To this end the master will keep the Hydrographic office informed of an address to which publications may be mailed. It is also understood that no expense for postage need be incurred in the United States by using the penalty envelope for official purposes, and, in foreign parts, by handing the record of observation to any American Consul or representative for transmission.

300 16. That demurrage, general average, and all other claims against the cargo to be settled by the Auditor for the Navy Department, Wash., D. C.

Bidders should state shortest time in which deliveries can be made.

.... do hereby agree to furnish within .....
(I or we.) (State definite number.)
days, and in conformity with this proposal, the above articles at the prices affixed thereto, and (if the amount of the proposal exceeds five hundred dollars), within five days after receipt of notice of its acceptance, to enter into contract (in accord-

ance with the general conditions printed hereon) to furnish and deliver the articles as stated. In event of ..... failure to make delivery within
(My or our.)
the time specified, or to execute the contract as agreed, the order to be placed elsewhere, and any difference in price charged to.....account
(My or our.)

(Signature. If a corporation, its name and signature of an officer is required.) .....

(Address) .....

This Must Be filled out and signed by bidder 302 without alterations.

If not prepared to submit a bid, please so state over the first signature and return this paper so that it may be known that it was brought to your attention; otherwise your name may be dropped from the list of prospective bidders.

NOTICE.—The Paymaster General directs that invitations to bid on supplies required shall not be sent to persons so long as they are in arrears in the satisfactory delivery of supplies already ordered, and that this notice shall appear upon all invitations to bid and orders for supplies.

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CONDITIONS OF CONTRACT.

In case this proposal shall be accepted, and the amount of the proposal exceeds five hundred dollars, contract to furnish and deliver the articles must be executed within five days after the receipt of notice of such acceptance. In case the amount of the proposal exceeds five hundred dollars, and the time allowed for delivery is in excess of thirty days, the contract must be accompanied by a bond, with satisfactory security, in a sum equal to 25 or 50 per cent (at the option of the Government) of the total amount of this proposal, for the faith-

304 *Defendant's Exhibits.*

ful performance of such contract; or, in lieu thereof, a certified check, payable to the order of the Secretary of the Navy, for 25 per cent of the full amount of the contract; the check to be held until the requirements of the contract shall be complied with and as a guaranty for compliance with the same.

The Purchasing Pay Officer may, in case he should so elect, purchase or procure in such manner and from such person or persons as he deems proper, irrespective of the prices to be paid there-
305 for, such of said articles or materials, of the kind specified, as near as practicable, or procure the performance of such services as the contractor shall fail to deliver or perform as required, and may demand and recover from the contractor the difference between the price so paid therefor and the price stipulated in the contract; and the amount of such difference shall be paid by the contractor to the Paymaster General on demand.

In the case of contracts wherein the amount exceeds five hundred dollars it will be agreed that time will be an essential feature of the contract, and that if the contractor shall fail to deliver any
306 or all of the articles or materials, or to perform any or all of the services contracted for, in conformity with the conditions and requirements of the contract, the Government will be damaged thereby, and the amount of said damages being difficult, if not impossible of definite ascertainment and proof, that the amount of said damages shall be estimated, agreed upon, liquidated, and fixed in advance; and the Paymaster General shall make deductions from the contract price of all supplies not satisfactorily delivered or services not satisfactorily performed by the last day of the time fixed therefor by the contract, as follows, viz:

Up to and including ten thousand dollars ($10,000) in value at contract prices at the rate of one-tenth of 1 per cent, and above ten thousand ($10,000 at the rate of one-twentieth of 1 per cent, for each day's delay until satisfactory delivery or performance shall have been made, or until such time as the Paymaster General may procure the same as hereinafter provided, *Provided,* That in no case shall the deductions to be made exceed 10 per cent of the stipulated value of the articles or materials not so delivered or services not so performed; rejection of deliveries or performance not to be con- 308
sidered as waiving deductions: *Provided,* That such delays shall not have been caused by act of the Government, by strikes, riots, fire, or other disaster, delays in transit or delivery on the part of transportation companies, or by other circumstances beyond the control of the contractor, but such circumstances shall not be deemed to include delays on the part of subcontractors in furnishing materials when such delays arise from causes other than those herein specified: *And provided further,* That the question whether delays are due to the causes herein specified shall be determined by the Paymaster General. 309

The contractor shall indemnify the United States, and all persons acting under them, for all liability on account of any patent rights granted by the United States which may affect the adoption or use of the article contracted for: no Member of, or Delegate to, Congress, nor any person belonging to, or employed in, the naval service, shall be admitted to any share or part of the contract, or to any benefit which may arise therefrom, except as a member of a corporation: in carrying out the provisions of the contract, no person undergoing

310 *Defendant's Exhibits.*

sentence of imprisonment at hard labor which has been imposed by a court of the United States, or of any State, Territory, or municipality having criminal jurisdiction, shall be employed; any transfer of this contract, or of any interest therein, to any other person or party than said contractor, shall annul this contract so far as the United States is concerned; and if said contractor shall fail in any respect to perform the contract, it may, at the option of the United States, be declared null and void, without prejudice to the right of the United
311 States to recover for defaults therein or violations thereeof.

No payments shall be made until all the articles or services embraced in such class shall have been delivered or performed and accepted, except at the option of the Bureau of Supplies and Accounts.

## CONDITIONS OF DELIVERY.

1. Supplies and materials shall be marked with the requisition or contract number and addressed to the General Storekeeper at the navy yard or station designated.

312 Unless otherwise expressly stated in the specifications on the requisition or proposal, they shall be delivered in accordance with the following:

(a) In cases of deliveries by rail, where rail connections exist by which cars can be switched into the railroad system of the yard, delivery shall be accomplished when the cars have been delivered within the navy yard limits; all charges for switching into the yard to be at the expense of the contractor. The yard engine will then run the ca to the point desired, and the material shall, except as otherwise provided hereinafter, be unloaded by the Government and at its expense. The time al-

lowance to the Government for unloading the cars, after their receipt in the yard, shall be the same as that allowed to local commercial concerns in the port nearest the navy yard where delivery is made. The Government will be responsible for demurrage charges only after that time.

(b) In cases of deliveries by water on the water front, after assignment of berth, the vessel, barge, or lighter shall be brought alongside and discharged; and delivery shall be accomplished when the material is delivered f. o. b. wharf—over the rail. The expense of delivery, unless expressly 314
stated to the contrary in the specifications under the class, shall be borne by the contractor. If, through fault of its own, the yard fails to assign berth within twenty-four hours after vessel arrives and reports readiness to discharge, or to take discharge as required by bill of lading or custom of the port, the Government will become liable for the payment of demurrage in accordance with customary usage.

If, according to the contract, the Government is to unload, a reasonable time—to be the same as that allowed to local commercial concerns in the port nearest the yard where delivery is made— 315
must be allowed the Government for unloading after vessel is berthed at the yard, without any charge for demurrage. All lighterage charges must be borne by the contractor.

(c) In cases of deliveries made from drays, carts, trucks, wagons, by hand, or in like manner, the articles shall be conveyed to the ground floor entrance of the receiving store or building, or to such other place in the yard as may be indicated, and there unloaded. All articles or materials that can be handled by one man are to be un-

316 *Defendant's Exhibits.*

loaded by the truckman making the delivery. In case of articles that are beyond the capacity of one man to unload, such assistance and navy yard appliances as may be necessary will be furnished by the Government free of charge.

(d) Whenever practicable, the use, free of charge, of such cranes, derricks, and other yard appliances and facilities as may be available at the time, will be placed at the disposal of the contractor to assist in the unloading of cars, vessels, and other conveyances or vehicles, and no charge will
317 be made for the use of such appliances or for the fuel or other material, or the labor necessary for handling them. In consideration of the use of Government appliances as above, the contractor shall assume all responsibility for any loss or damage resulting from their operation.

In those cases, however, in which the contractor is required to do erecting, or installing, or other work for the Government after delivery, he shall, at his own expense—unless the specifications distinctly provide to the contrary—unload the articles or materials from car, vessel, or other conveyance, or vehicle, and transport same to designated
318 place where such work is to be done. He shall, however, whenever practicable, have placed at his disposal, in unloading and transporting the materials and in prosecuting the work, the use, free of charge, of such cranes, derricks, and other yard appliances and facilities as may at the time be available; but the cost of the fuel or other material and of the labor necessary for the operation thereof shall be paid by the contractor.

(e) The Government shall in all cases be relieved from responsibility for articles or materials delivered by a contractor until after their accept-

ance, except in case of loss or damage through fault of its own. Upon delivery, the contractor's obligations as to moving and handling articles and materials will cease, except in case of rejection or as otherwise specified elsewhere herein. The contractor will be permitted to have a representative present to witness discharge; but such representative must arrive at the yard in time to prevent delay in unloading. All expenses of handling after unloading, inspection, piling, and storing will be borne by the Government. Inspection may be made, if convenient, at the discretion of the in- 320
specting officer, with the Commandant's approval, prior to discharge or during process of unloading.

(f) Deliveries, either by rail, water, truck, or otherwise, must be made within working hours and in ample time to allow for the unloading—and, if necessary, the storing—of the articles or materials before the closing of the yard. Deliveries at any other time will not be accepted, unless special arrangements have been previously made with the Commandant; and in all such cases the contractor will be required to pay all expenses incurred by the government for fuel or other material and labor in receiving his delivery. 321

(g) Rejected articles must be removed from the yard by the contractor at his own expense. In case of failure by the contractor to so remove rejected articles within a reasonable time the General Storekeeper will return the same to him at the contractor's own risk, and all expenses incurred by the Government for the use of labor, material, yard appliances, and facilities in handling, reloading, teaming, or otherwise, in connection with the return to the contractor of such rejected articles will be charged to his account.

322 *Defendant's Exhibits.*

INSTRUCTIONS.

No alteration, erasure, or addition to be made in the typewritten, printed, or written matter. No change in specifications allowed. Bidders can make any explanations they wish on blank space below specifications, or by memorandum attached to proposal, or by letter sent with it. No samples are to be submitted unless asked for.

Time of proposed delivery must be stated in days. Such indefinite terms as "promptly," "without delay," "immediately," etc., will not be accepted.

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A bid is requested even if time of delivery desired by Pay Office must be exceeded by bidders. Dealers should always allow themselves sufficient margin to make their deliveries certain within the time they fix, but as near the time desired as possible.

In order that the necessary official record may be had, additional information, if required, must be obtained from or through this office.

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## Citation.

By the Honorable CHARLES M. HOUGH,
One of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

TO NEW YORK & PORTO RICO STEAMSHIP COMPANY, GREETING:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 20th day of December, 1913, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 20th day of November, in the year of our Lord One thousand nine hundred and thirteen, and of the Independence of the United States the One hundred and thirty-eighth.

C. M. HOUGH,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed): filed November 20, 1913.

328 **Stipulation.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NEW YORK AND PORTO RICO
STEAMSHIP COMPANY,
329 Defendant.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter, as agreed on by the parties.

Dated, November 25, 1913.

H .SNOWDEN MARSHALL,
Attorney for Plaintiff.

330

BURLINGHAM, MONTGOMERY & BEECHER,
Attorneys for Defendant.

## Clerk's Certificate.

331

UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF NEW YORK. } ss.:

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NEW YORK AND PORTO RICO
STEAMSHIP COMPANY,
Defendant.

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I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 10th day of December, in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the said United States the one hundred and thirty-eighth.

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ALEX. GILCHRIST, JR.,
Clerk.

United States Circuit Court of Appeals for the Second Circuit.

No. 204. October Term, 1913.

Argued December 15, 1913. Decided December 15, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
*vs.*
E NEW YORK AND PORTO RICO STEAMSHIP COMPANY,
defendant in error.

n error to the District Court of the United States for the Southern trict of New York.

Before Lacombe, Coxe, and Ward, circuit judges.

A. S. Pratt, Asst. U. S. Attorney, for the plaintiff in error.

Judgment affirmed in open court.

At a stated term of the United States Circuit Court of Appeals, in and for the second circuit, held at the court rooms the Post Office Building in the city of New York, on the 26th day December, one thousand nine hundred and thirteen.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. nry G. Ward, circuit judges.

THE UNITED STATES, PLAINTIFF IN ERROR,
*vs.*
E NEW YORK AND PORTO RICO STEAMSHIP COMPANY,
defendant in error.

Error to the District Court of the United States for the Southern trict of New York.

This cause came on to be heard on the transcript of record from District Court of the United States, for the Southern District of w York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and reed that the judgment of said district court be and it hereby is rmed.

t is further ordered that a mandate issue to the said district court accordance with this decree, said mandate to be stayed pending a t of error to the Supreme Court of the United States.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. U. S. *vs.* N. Y. & Porto Rico SS. Co. Order for ndate. United States Circuit Court of Appeals, Second Circuit. ed Dec. 26, 1913. William Parkin, Clerk.

115 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES, PLAINTIFF IN ERROR,
*v.*
NEW YORK & PORTO RICO STEAMSHIP COMPANY,
defendant in error.

The United States, plaintiff in error, above named, feeling itself aggrieved by the judgment and order of the United States Circuit Court of Appeals for the Second Circuit, entered herein on the 26th day of December, 1913, in the above-entitled cause affirming the judgment of the United States District Court for the Southern District of New York, dismissing the complaint of the United States, hereby prays this court for a writ of error to the United States Supreme Court in this cause and that the transcript of the record and proceedings and papers on which the said judgment and order were made and entered, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated: N. Y., Dec. 29, 1913.

H. SNOWDEN MARSHALL,
*U. S. Attorney for the Southern District of New York,*
*Attorney for Plaintiff in Error.*

The writ of error as prayed for in the foregoing petition is hereby granted and allowed this — day of December, 1913.

E. HENRY LACOMBE, *Judge.*

116 (Endorsed:) "A" Suit No. ——. U. S. Circuit Court of Appeals for the Second Circuit. United States, plaintiff in error, *vs.* New York & Porto Rico Steamship Company, defendant in error. Petition for writ of error and allowance thereof. H. Snowden Marshall. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 30, 1913. William Parkin, Clerk.

117 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES, PLAINTIFF IN ERROR,
*vs.*
NEW YORK & PORTO RICO STEAMSHIP COMPANY,
defendant in error.

Now comes the United States, by H. Snowden Marshall, United States attorney for the Southern District of New York, its attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I. The United States District Court for the Southern District of New York erred in directing a verdict for the defendant herein.

II. The United States District Court for the Southern District of New York erred in entering judgment herein for the defendant and against the plaintiff, dismissing the complaint of the plaintiff.

III. The United States District Court for the Southern District of New York erred in holding and deciding that the plaintiff did not prove a valid contract between it and the defendant within the terms of section 3744 of the Revised Statutes of the United States, and that the contract that was proved was invalid under the said section because it had not been reduced to writing and signed by the contracting parties with their names at the end thereof.

118 IV. This court erred in affirming the judgment of the United States District Court for the Southern District of New York herein.

V. This court erred in not reversing the judgment of the United States District Court for the Southern District of New York herein and in not remanding this case to the said court for a new trial.

VI. This court erred in holding and deciding that there was no valid and enforcible contract or agreement between the parties herein.

VII. This court erred in holding and deciding that the correspondence which passed between the parties herein did not create and constitute a valid and enforcible contract or agreement between them.

VIII. This court erred in holding and deciding that section 3744 of the Revised Statutes of the United States requires a contract made on behalf of the United States by a proper officer of the Navy Department to be reduced to writing and signed by the contracting parties, with their names at the end thereof, in order to enable the United States to enforce it by suit against the other party thereto.

IX. This court erred in holding and deciding that under section 3744 of the Revised Statutes of the United States a contract, consisting of correspondence which sufficiently complies with the statute of frauds, but not signed by the contracting parties with their

119 names at the end thereof, cannot be enforced at the suit of the United States against the other party thereto.

Wherefore the United States prays that the order and judgment of affirmance herein and the judgment of the said United States District Court for the Southern District of New York, for the errors aforesaid, and for other errors in the record and proceedings herein, may both be reversed and for naught held and esteemed, and that it may be restored to all things that it has lost by reason of such order and judgments, and that this case may be remanded to the United States District Court for the Southern District of New York for another trial.

Dated, December 29, 1913.

H. Snowden Marshall,
*United States Attorney for the Southern District of New York, Attorney for United States,*
*Office & P. O. Address, Room 50, P. O. Bldg.,*
*Borough of Manhattan, City of New York.*

120 (Endorsed:) "A" Suit No. 5201. U. S. Circuit Court of Appeals for the Second Circuit. United States, plaintiff in error, *vs.* New York & Porto Rico Steamship Company, defendant in error. Assignment of errors. H. Snowden Marshall. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 30, 1913. William Parkin, clerk.

121 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 120, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of United States against New York & Porto Rico Steamship Company, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 31st day of December, in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the said United States the one hundred and thirty-eighth.

[SEAL.] WM. PARKIN, *Clerk.*

122 By the honorable, one of the judges of the United States Circuit Court of Appeals for the Second Circuit. To New York & Porto Rico Steamship Company, defendant in error, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Capitol in the city of Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment or order in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district above named, on the 30th day of December, in the year of our Lord one thousand nine hundred and thirteen and of the independence of the United States the one hundred and thirty-eighth.

E. HENRY LACOMBE,
*Judge of the United States Circuit Court of Appeals for the Second Circuit.*

123 (Endorsed:) "A" Suit No. ——. U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error, *vs.* N. Y. & Porto Rico S/S Co., defendant in error.

Original citation. H. Snowden Marshall, United States attorney, attorney for United States. Due service of a copy of the within is hereby admitted. Dated New York, Dec. 30, 1913. Attorney for deft. in error.

124 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit *Court*, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals for the Second Circuit, before you or some of you, between the United States of America, plaintiff in error, and New York and Porto Rico Steamship Company, defendant in error, a manifest error hath happened to the great damage of the said United States of America, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the records and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 30th day of December in the year of our
125 Lord one thousand nine hundred and thirteen and of the independence of the United States the one hundred and thirty-eighth.

WM. PARKIN,
*Clerk of the United States Circuit Court of Appeals for the Second Circuit.*

The foregoing writ is hereby allowed.

[SEAL.]

E. HENRY LACOMBE,
*U. S. Circuit Court Judge.*

126 (Endorsed:) "A" Suit No. ——. U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error, *vs.* N. Y. & Porto Rico S/S Co., defendant in error. Original writ of error. H. Snowden Marshall, United States attorney, attorney for United States. Due service of a copy of the within is hereby admitted. Dated New York, Dec. 30, 1913. Attorney for deft. in error.

127 In the Supreme Court of the United States. October Term, 1913.

UNITED STATES, PLAINTIFF IN ERROR,
*v.* No. 848.
NEW YORK AND PORTO RICO STEAMSHIP COMPANY.

STIPULATION

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the opinion of the United States Circuit Court of Appeals for the Second Circuit, known as the opinion on the first hearing, hereto attached, shall be added to the original transcript of the record now on file in the Supreme Court of the United States.

JNO. W. DAVIS, *Solicitor General.*
CHARLES C. BURLINGHAM,
BURLINGHAM, MONTGOMERY & BEECHER,
*Counsel for Defendant in Error.*

JANUARY, 1914.

128 United States Circuit Court of Appeals for the Second Circuit.

No. 246—October term, 1912.

Argued May 23, 1913. Decided June 12, 1913.

NEW YORK & PORTO RICO STEAMSHIP COMPANY, plaintiff in error (defendant below),
*against*
UNITED STATES OF AMERICA, DEFENDANT IN ERROR (plaintiff below).

In error to the District Court of the United States for the Southern District of New York.

Before Lacombe, Coxe, and Ward, circuit judges.

On writ of error to the United States District Court for the Southern District of New York to review a judgment for $11,337.10 in favor of the United States, the plaintiff below. The action was tried by the court, a jury having been waived by written stipulation. The parties will be referred to as they appear in the court below, viz, as plaintiff and defendant.

James H. Hayden, Norman B. Beecher, and Ray Rood Allen, for plaintiff in error.

H. Snowden Marshall, U. S. attorney, and Addison S. Pratt and Isaac H. Levy, assistant U. S. attorneys, for defendant in error.

129 This action was brought to recover $10,249.20 and interest as damages for the breach of an alleged contract, by the terms of which the defendant agreed to furnish two steamers to transport,

for the use of the plaintiff, not less than 8,000 tons of coal from Atlantic ports to San Francisco. It is unnecessary to review the testimony in detail, for the reason that the principal question is one of law arising upon undisputed facts. The defendant contends that there can be no recovery by the plaintiff for the reason that no contract existed between them and that the papers relied on are nothing more than "the preliminary memoranda made by the parties." South Boston Iron Co. v. U. S., 118 U. S., 37.

Section 3744 of the Revised Statutes provides as follows:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof."

It is not pretended that the provisions of this law were complied with in the present case. The negotiations for transporting the coal in question were carried on by the Navy Department on one side and the defendant on the other. The agreement was not reduced to writing and, of course, it was not signed by the parties at the end thereof or anywhere else. The language of the statute is so clear and explicit that it is not easy to see how there can be any serious question as to its meaning. Assuming that it was the intention of the lawmakers that no oral agreement, no matter how clear the proof, should be recognized, it is difficult to perceive how they could have expressed themselves with greater clearness than by directing that every contract shall be reduced to writing and signed by both parties with their names at the end thereof. But if any doubt as to the interpretation of the law existed it was set at rest by the decision of the Supreme Court in Clark v. U. S., 95 U. S., 539. Mr. Justice Bradley, in speaking of the law in question here, says:

130 "The Court of Claims has heretofore held that act to be mandatory, and as requiring all contracts made with the departments named to be in conformity with it. The arguments by which this view has been enforced by that court are of great weight, and, in our judgment, conclusive. * * * Perhaps the primary object of the statute was to impose a restraint upon the officers themselves and prevent them from making reckless engagements for the Government; but the considerations referred to make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than this. And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make such contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of opinion, therefore, that the contract itself is affected and must

conform to the requirements of the statute until it passes from the observation and control of the party who enters into it."

See also St. Louis Hay and Grain Co. *v.* U. S., 191 U. S., 159, in which Mr. Justice Holmes says:

"Although, no doubt, both parties supposed their agreement binding, the Court of Claims held, and it is not disputed, that the contract was within Rev. Stat., sec. 3744, and not having been 'reduced to writing and signed by the contracting parties with their names at the end thereof' could not have been sued upon if it had not been performed."

The contention that the statute is made only for the protection of the Government is, we think, contrary to good law and good morals as well. There is nothing in the language of the act to warrant such an interpretation. If it had been the intention of Congress to make the signature of one of the parties evidence of a contract, it
131 surely would have so said. Instead of doing so it says that the writing must be signed by the contracting parties with their names at the end thereof. We cannot believe that it was the purpose of Congress to permit the Government to enforce as against the citizen an oral agreement or one partly evidenced by writing, but which violates all the requirements of the statute, and refuse all relief when a citizen seeks to enforce a similar contract against the Government. It cannot be that the validity of a contract depends upon whether the party of the first part or the second part is seeking to enforce it. Such a construction would enable the Government, in cases like the one at bar, to enforce an unsigned agreement if favorable to it and repudiate it if favorable to the other party. We have nothing to do with the policy of the law, whether wise or unwise; we take it as we find it and construe it according to the obvious meaning of the language employed. The question is not what the law should be, but what it is; and that question, in view of the interpretation of the Supreme Court, is not, in our opinion, open to doubt. If Congress wishes the agreements between the Navy Department and individuals to depend on oral testimony, it has only to repeal or modify the statute in question; this court can do neither.

The judgment is reversed.

A true copy.

[SEAL.] WM. PARKIN,
*Clerk.*

132 (Endorsed:) File No. 23999. Supreme Court U. S., October term, 1913. Term No. 848. The United States, pl'ff in error, *vs.* New York & Porto Rico Steamship Company. Stipulation of counsel and addition to record. Filed January 7, 1914.

133 (Endorsed:) File No. 23999. U. S. Circuit Court Appeals, 2d Circuit. Term No. 848. The United States of America, plaintiff in error, *vs.* New York & Porto Rico Steamship Company. Filed January 5th, 1914. File No. 23999.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
*v.*
THE NEW YORK AND PORTO RICO STEAMSHIP COMPANY.
No. 44.

*IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

This is a suit by the United States to recover $10,249.20 and interest as damages for breach of contract. The first count of the complaint alleges a breach of agreement by the defendant company to transport coal. The second count alleges that after notifying plaintiff of its inability to perform, defendant requested plaintiff to secure the transportation by other means, and that in pursuance thereof plaintiff procured the transportation at an increased cost. The third count is for money paid out at the request and on account of the defendant. Upon the first trial without a jury judgment went for the plaintiff. The

Circuit Court of Appeals reversed the judgment (R. 118), 206 Fed. 443. The second trial was on the same record as that of the first trial (R. 21). On the second trial verdict was directed for the defendant (R. 22). Judgment on the verdict was affirmed by the Circuit Court of Appeals (R. 113), 209 Fed. 1007. The case comes here by writ of error sued out by the United States.

On November 9, 1909, the Bureau of Supplies and Accounts of the Navy Department called, in writing, for tenders for the transportation of coal from leading ports on the Chesapeake Bay to Mare Island or San Francisco (R. 56). Defendant in response thereto submitted a tender on November 13, 1909, in writing, offering two steamers to load between December 10 and 25, 1909, at $3.33 per ton (R. 58). Acceptance was telegraphed on the same day (R. 59), as follows:

> Your offer one steamer December tenth twenty-fifth cancelling and one steamer December twenty-fifth cancelling but for loading on date satisfactory to Bureau accepted at three dollars thirty-three per ton each steamer. Usual Bureau conditions to govern.

On November 15, 1909, defendant, in writing, confirmed the agreement, acknowledging receipt of the acceptance of its offer (R. 60), as follows:

> We beg to acknowledge receipt of your telegram of November 13th, accepting our offer of one steamer to make loading at Philadelphia, Baltimore, Norfolk, or Newport News, between December 10th and 25th, and one

> steamer to report for loading any time previous to December 25th, on date satisfactory to the Department, for Mare Island or San Francisco, at $3.33 per ton, and we will in due course advise you what steamers we will tender on this business.

Formal notice was given by defendant on December 14, 1909, that it could not fulfill the contract, and request was made that the transportation be secured by the Navy Department at reasonable cost, either by diverting tonnage under charter, or by securing new tonnage in the general market, provided the transportation could be secured at reasonable cost (R. 67, 68). Plaintiff's evidence was to the effect that in pursuance of the offer thus made circulars were sent out to shipping concerns asking for bids to be opened four days later, or December 18th (R. 47). At the opening of bids on December 18th defendant's representative was present (R. 40), was asked if the New York and Porto Rico Steamship Company could do any better, and he replied that it could not (R. 50). Contract was then made with the Baker Transportation Company for diverting the tonnage necessary, and the diversion of 11,388 tons accomplished at a cost of 85 cents per ton in excess of the defendant's price. The total increased cost, or $9,679.80, was paid to the Baker Transportation Company on January 28, 1910 (R. 52).

The defense rested on the proposition that the contract was not in writing as required by section 3744, R. S. The District Court upon the first trial held that the statute could not be pleaded as a

defense against the Government. 197 Fed. 995. But the Circuit Court of Appeals held to the contrary. (Opinion, R. 118); 206 Fed. 443.

### SPECIFICATIONS OF ERROR.

The assignments of error (R. 114, 115) raise the question as to the effect of section 3744 of the Revised Statutes in suit brought by the United States for damages resulting to it from breach of contract. The Government contends that the statute furnishes the contractor in this case no defense, either in suit upon an executory or executed contract.

### BRIEF OF ARGUMENT.

I. Section 3744, Revised Statutes, is no bar to suit by the Government on executory parol contracts.

1. The statute does not render the contract illegal but only unenforceable. It affects not the validity of the contract but the remedy thereon.

2. Section 3744, R. S., is solely for the protection of the Government.

3. The Government may waive compliance with statutory forms required for its protection.

4. Since the Government is not expressly named in the statute, its remedy by suit on a valid common law contract is not barred.

II. The signed offer and acceptance in writing constitute compliance with the statute.

III. The statute does not apply to executed contracts and is no bar to suit on a parol contract after performance by plaintiff.

## ARGUMENT.

### I.

### Section 3744, Revised Statutes, is no bar to suit by the Government on executory parol contracts.

**1. The statute does not render the contract illegal but only unenforceable. It affects not the validity of the contract but the remedy thereon.**

A contract to furnish transportation of coal, valid in absence of statute, is clearly deducible from defendant's offer of November 13, 1909, in response to plaintiff's advertisement, plaintiff's acceptance of the same day, and defendant's confirmation of November 15, 1909. *Garfielde* v. *United States*, 93 U. S. 242; *United States* v. *Andrews*, 207 U. S. 229.

Sections 3744, 3745, 3746, and 3747 of the Revised Statutes (originally act of June 2, 1862, c. 93, 12 Stat. 411) provide:

> It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting

bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return.

SEC. 3745. It shall be the further duty of the officer, before making his return, according to the preceding section, to affix to the same his affidavit in the following form, sworn to before some magistrate having authority to administer oaths: "I do solemnly swear (or affirm) that the copy of the contract hereto annexed is an exact copy of a contract made by me personally with ------; and that I made the same fairly without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said ------, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided."

SEC. 3746. Every officer who makes any contract, and fails or neglects to make return of the same, according to the provisions of the two preceding sections, unless from unavoidable accident or causes not within his control, shall be deemed guilty of a misdemeanor, and shall be fined not less than one hundred dollars nor more than five hundred, and imprisoned not more than six months.

SEC. 3747. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to furnish every officer appointed by them with authority to

make contracts on behalf of the Government with a printed letter of instructions, setting forth the duties of such officer, under the two preceding sections, and also to furnish therewith forms, printed in blank, of contracts to be made, and the affidavit of returns required to be affixed thereto, so that all the instruments may be as nearly uniform as possible.

By the cases construing section 3744, Revised Statutes, it is now settled that the act is mandatory in its requirement that the contract be signed by the Secretary of the Navy or his subordinate and the other party to the contract, and that in absence of writing duly signed recovery of damages for breach of an executory contract cannot be had *against* the United States. *Clark* v. *United States*, 95 U. S. 539; *South Boston Iron Co.* v. *United States*, 118 U. S. 37. But the validity of the common law contract is not affected by the statute. Only the remedy thereon is taken away from the individual who does not comply with its terms. The terms of section 3744 in themselves presuppose an existing contract. It is made the duty of the officers named to *reduce the contract* to writing.

In *United States* v. *Andrews*, 207 U. S. 229, where performance had been made by the plaintiff, he was allowed to recover damages for breach of a contract, not signed as required by the statute. The contract was for the delivery of paper aboard a ship bound for the Philippine Islands. The paper, duly delivered, was damaged at sea. Section 3744 was held to be no defense, on the ground that the contract had been

executed. Throughout the discussion of the case the court refers to the terms of *the contract*. After consideration of the letters of offer and acceptance and other correspondence it was held that the United States was a party *to the contract*. Yet it was considered that there was no writing in the form prescribed by statute, evidencing the contract. The court said (pp. 238, 240, 241, 243):

> * * * Testing whether the paper was bought by the United States by the contract and course of dealing as disclosed by the findings, we think there is no escape from the conclusion that the United States was the party contracting for the purchase. * * * Besides, the subsequent correspondence and dealings which we shall hereafter consider in determining whether the paper was delivered under the contract prior to the happening of the damage, we think will serve to make clear the fact that both parties deemed *the contract* was one made in the name of and for account of the United States.
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> * * * * *
>
> In considering the matter it is to be conceded that *the contract* is not to be deduced alone from the letter of the Division of Insular Affairs of May 31, 1901, and the reply of Andrews & Co. of June 7, but it is to be ascertained by a consideration of those letters and the subsequent correspondence under which the purchase was concluded and the shipment made.
>
> * * * * *

> In any event, taking the most favorable view possible for the Government *of the contract*, we think it cannot be said that the presumption which arises from the delivery of the goods to the carrier designated by the Government and the acceptance by the Government of the bills of lading made to the consignee or his order, is rebutted *by the contract*.

Recovery was allowed against the United States on the contract, not on *quantum valebat*. If section 3744 had the effect of making absolutely void and illegal, not merely unenforceable, common law contracts not reduced to writing, the court could not have considered the terms of the contract or whether they had been fulfilled. Then only the liability of the Government upon *quantum valebat* for value received would have been material. The holding is consistent only with the theory that the effect of section 3744 is like that of the Statute of Frauds, namely, that no remedy can be had to enforce a valid common law contract for lack of the signed writing, but the validity of the contract itself is to be ascertained without reference to the statute.

In *St. Louis Hay and Grain Co.* v. *United States*, 191 U. S. 159, pursuant to a contract not reduced to writing as required by section 3744, Revised Statutes, the United States purchased and paid for hay. The Hay Company sought to recover the reasonable value of the hay, which was in excess of the contract price, on *quantum valebat* on the ground that the contract was void. But it was held that the contract having been performed constituted a defense to the claim

for further compensation. The contract was unenforceable, but there was a contract.

A criminal penalty is imposed upon the officer only for failure to file a return of the contract. The failure to sign the written contract is not punishable. That the contract in itself is not illegal is shown by the allowance of recovery upon *quantum meruit* for the reasonable value of services rendered in *Clark* v. *United States, supra.*

In the *Clark* case, p. 543, the statute is analogized to the Statute of Frauds, and Browne's treatise on the Statute of Frauds is cited. The effect of the statute upon parol contracts is admirably stated by this author as follows:

> § 115a. The operation, then, which the statute has upon a contract covered by it, is that no enforcement of the contract can be had, while the requirements of the statute remain unsatisfied, if the party against whom enforcement is sought choose to insist upon this defence; the statute does not make the contract illegal; a contract which was legal and actionable before the statute is legal since and notwithstanding the statute, and is also actionable or enforceable if the making of the contract be followed by compliance with the requirements of the statute. Compliance with the requirements of the statute does not constitute the contract; the statute presupposes an existing lawful contract, the enforcement of which is suspended till the statute is satisfied. (Browne on Statute of Frauds, 5th ed.)

**2. Section 3744, Revised Statutes, is solely for the protection of the Government.**

The section is one of many in the Revised Statutes designed to protect the pecuniary interests of the Government from loss by fraud. Experience has shown that the Government can not deal as a private party at arms length. As was said in *United States* v. *Verdier*, 164 U. S. 213, 218:

> * * * The truth is that in its dealings with individuals public policy demands that the government should occupy an apparently favored position.

Among other protective restrictions of the chapter on making Public Contracts, sections 3739–3742, Revised Statutes, provide prohibitions against members of Congress having interest in contracts made on behalf of the United States; section 3709 requires advertisements for proposals; sections 3718–3724 deal with competitive bidding.

Sections 3744 to 3747 of the Revised Statutes were originally enacted in the act of June 2, 1862, c. 93, 12 Stat. 411, 412, entitled "An Act to prevent and punish Frauds on the Part of Officers intrusted with making of Contracts for the Government." The enormous frauds practiced upon the Government in connection with the furnishing of supplies to the armies of the Civil War were prominently before the country at the time. Protection of the public purse was its object. As Mr. Justice Bradley said in *Clark* v. *United States*, 95 U. S. 539, 541–542:

> * * * *The facility with which the government may be pillaged* by the presentment of

> claims of the most extraordinary character, if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that *all contracts which are made the basis of demands against the government should be in writing.* (Italics ours.)

The primary method of protecting the United States was by publicity. To this end the terms of the act are almost entirely directed. All bids and proposals received, the advertisement inviting bids, and all papers relating to the contract, must be filed by the officer making the contract, together with his affidavit stating that the contract was made fairly and without corrupt advantage to himself or to any other person.

Protection to the individual was by no means the object of the statute. Fraud on the part of the Government or its officers against citizens has ever been an evil to be avoided. Protection to the citizen against the uncertainty of parol contracts was needless moreover, for the State statutes of frauds were ample in this respect.

Imposing a duty upon the officer is not, of course, the same as imposing a duty upon the Government. In *Dollar Savings Bank* v. *United States*, 19 Wall. 227, it was held that the United States was not bound by statutory directions to its officers. Recovery in action of debt by the Government of taxes unpaid was allowed although the statute prescribed a particular mode of collection of unpaid taxes by the assessor

and collector. (14 Stat. 103, 104, 138.) The court said (p. 239):

> * * * But by the Internal Revenue law, the United States are not prohibited from adopting any remedies for the recovery of a debt due to them which are known to the laws of Pennsylvania. The prohibitions, if any, either express or implied, contained in the enactment of 1866, are for others, not for the government. *They may be obligatory upon tax collectors. They may prevent any suit at law by such officers or agents. But they are not rules for the conduct of the state.* It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different states, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the king in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution.
>
> It must then be concluded that the government is not prohibited by anything contained

> in the act of 1866 from employing any common-law remedy for the collection of its dues. The reason of the rule which denies to others the use of any other than the statutory remedy is wanting, therefore, in applicability to the government, and the rule itself must not be extended beyond its reason. (Italics ours.)

The failure of the officer to perform his statutory duties not only does not bind the Government, but, quite to the contrary, is punishable by the Government. Indeed, the very object of the statutory requirements of publicity was to protect the Government against the fraud of its own officers.

If the United States were bound by the failure of the officer to affix his signature to a writing, a duty imposed by one clause of section 3744, it would likewise be barred from recovery if the officer failed to make return of a duly signed contract as required in the next clause of the section. The requirement as to filing is just as strict and direct as the requirement in the same sentence as to writing. That the papers be "attached together by a ribbon and seal" is also quite as definitely prescribed. Yet it must be conceded that even the individual may enforce a duly signed contract if the officer fails to make return with ribbon and seal. *Clark* v. *United States*, 95 U. S. 539, 542. The individual, it is true, has no remedy on an unsigned contract simply because he has failed to do what the statute required of him, namely, to sign a written copy. See *Clark* case, *supra*, p. 542. But the Government, as distinguished from its officers, is not at fault in any way.

What conceivable object could the Legislature have had in divesting the Government of its remedy on a valid contract? Fairness to the individual cannot be urged. There is nothing unfair in holding the individual to the agreement which he has voluntarily made, at the same time depriving him of remedy where he has failed to perform the statutory duty imposed upon him. But language must be clear and unequivocal, indeed, before it can be concluded that the right of the War and Navy Departments of the Government to make enforceable contracts with dispatch, *e. g.*, by telegram, a right of paramount public importance in case of war, is taken away.

**3. The Government may waive compliance with statutory forms required for its protection.**

Thus, section 3477, Revised Statutes, provides:

> All transfers and assignments made of any claim upon the United States * * * *shall be absolutely null and void*, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

In *McGowan* v. *Parish*, 237 U. S. 285, the court said (pp. 294, 295):

> As to the effect of sec. 3477, Rev. Stat., it has been several times declared by this court that the statute was intended solely for the protection of the Government and its officers during the adjustment of claims, and that, after allowance, the protection may be invoked or waived,

as they in their judgment deem proper. *Goodman* v. *Niblack*, 102 U. S. 556, 560; *Bailey* v. *United States*, 109 U. S. 432, 439; *Hobbs* v. *McLean*, 117 U. S. 567, 576; *Freedman's Saving Co.* v. *Shepherd*, 127 U. S. 494, 506; *Price* v. *Forrest*, 173 U. S. 410, 423. But see *Nutt* v. *Knut*, 200 U. S. 12, 20.

Accordingly it was precisely held in *Bailey* v. *United States*, 109 U. S. 432, notwithstanding the positive statutory declaration that an unwitnessed assignment shall be absolutely *null and void*, where the United States chose to honor an unwitnessed assignment by payment to the assignee, the assignor could not recover from the United States. Void was held to mean voidable at the option of the party entitled to protection.

Similarly, the requirements of advertisement for bids and competitive bidding in Revised Statutes, section 3709 *et seq.*, are designed to protect the Government and may be waived. In *Driscoll* v. *United States*, 13 Ct. Cl. 15, the court said that failure to make advertisement as required rendered the contract voidable by the United States, not void. On appeal—96 U. S. 421—the case went off on other grounds. In *People* v. *Secretary of State*, 58 Ill. 90, it was held where the statute required bids to be opened in the presence of the state auditor and treasurer that the state must pay the contract price of paper already accepted under a contract awarded in violation of the statute, but need not perform the unexecuted portion of the contract. Similarly, in *Woodruff* v. *Berry*, 40 Ark.

251, where a contract for public printing was let without advertising the required number of days, it was held that the contract was (p. 256) "voidable at the election of the State."

These cases, where the contract is *intra vires* and simply a formal requirement is disregarded, are to be distinguished from cases of contracts attempted to be made by municipal corporations in excess of powers conferred in their charters. If the charter of a municipal corporation makes the execution of contracts not advertised and bid for *ultra vires*, a different question is presented.

A party induced to contract by fraud may waive his right to repudiate and enforce the contract. Section 3744, R. S., in effect declares that all contracts not in the statutory form shall be deemed fraudulent. If the United States does not elect to avoid the contract until after performance by the other side, it is bound. *United States* v. *Andrews, supra*, p. 7. Correlatively, and to carry out the purpose of the statute—the protection of the Government—precisely as in the *Bailey* case, *supra*, the Government should be permitted to waive the lack of statutory form in seeking to enforce the common law contract.

**4. Since the Government is not expressly named in the statute, its remedy by suit on a valid common law contract is not barred.**

It is a settled rule of construction that although the Government may take the benefit of a statute it is not bound thereby unless expressly named. The rule is of special force where the general words

of the statute would, if applied, take away any prerogative, right, or interest of the Government.

In *Stanley* v. *Schwalby*, 147 U. S. 508, it was held that the Government was not bound by a statute of limitations in general terms, although it was recognized that benefit could be taken of the statute without express provision. The court said (pp. 514, 515, 517):

> The rule that the United States are not bound and the reason for it are thus given in *United States* v. *Nashville, Chattanooga &c. Railway*, 118 U. S. 120, 125: "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." And this doctrine was declared by the court in *United States* v. *Insley*, 130 U. S. 263, 266, to be "applicable with equal force, not only to the question of the statute of limitations in a suit at law, but also to the question of laches in a suit in equity."
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> But, as observed by Mr. Justice Strong, delivering the opinion of the court in *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239, while the king is not bound by any act of Parliament unless he be named therein by special

and particular words, he may take the benefit of any particular act though not named. And, he adds, that the rule thus settled as to the British crown is equally applicable to this government; and that so much of the royal prerogative as belonged to the king in his capacity of *parens patriae* or universal trustee, enters as much into our political state as it does into the principles of the British constitution.

* * * * *

And so, in *People* v. *Gilbert*, 18 Johns. 227, it was pointed out by way of illustration that the same rule of construction applied to the statute concerning costs, which the State may recover, though not obliged to pay them because not included in the general terms of the statute.

It is obvious that the ground of the exemption of governments from statutory bars or the consequences of laches has no existence in the instance of individuals, and we think the proposition can not be maintained that because a government is not bound by statutes of limitation therefore the citizen can not be bound as between himself and the government.

In accord are *Stanley* v. *Schwalby*, 162 U. S. 255, and *State* v. *Kinne*, 41 N. H. 238, where it was held that costs can not be recovered against the Government.

In *United States* v. *Herron*, 20 Wall. 251, it was held that although the United States was a preferred creditor against a bankrupt, a discharge under the general provisions of the bankrupt law making a discharge in bankruptcy a release from "*all* debts, claims, liabili-

ties, and demands which were or might have been proved against his estate in bankruptcy" to be pleaded "as a full and complete bar to *all* suits brought on any such debts, claims, liabilities, or demands," was no defense to an action by the United States against the bankrupt upon a provable debt. The court said (p. 263):

> Sanctioned as that principle is by two express decisions of this court, it would seem that further discussion of it is unnecessary, as it has never been questioned by any well considered case, State or Federal, and is founded in the presumption that the legislature, if they inntended to divest the sovereig power of any right, privilege, title, or interest, would say so in express words; and where the act contains no words to express such an intent, that it will be presumed that the intent does not exist.

Interest can not be awarded against the Government under general statutes. *United States* v. *North Carolina*, 136 U. S. 211, 216; *Angarica* v. *Bayard*, 127 U. S. 251, 260; *Ohio* v. *Board of Public Works*, 36 Ohio St. 409. But the United States may take advantage of a general statute awarding interest. *United States* v. *Verdier*, 164 U. S. 213.

This principle of statutory construction has been applied in England with reference to the Statute of Frauds itself. In *Rex* v. *Portington*, 1 Salk. 162, it was held that the Statute of Frauds did not bind the king. Chitty, Prerogatives of the Crown, pp. 366, 382, 383, states that acts taking away the King's

remedies do not bind him, and accordingly the Crown is not bound by the Statute of Frauds. In 19 Viner's Abridgment, title "Statute," E. 10, subhead 16, it is stated:

> 29 Car. 2 cap. 3 of frauds and perjuries binds not the king, but takes place only between party and party. 1 Salk. 162. 4 W. & M. in case of the *King* v. *Lady Portington*.

The same doctrine is stated in Broom's Legal Maxims, 7th ed., p. 58, under the head "Roy n'est Lie per ascum Statute, si il ne soit expressement nosme," and in Bacon's Abridgment, title, "Prerogative," E, c, Bouvier's Am. ed., p. 94. Lord Hardwicke, in *Adlington* v. *Cann*, 3 Atk. 141, 153, is said to have doubted the general doctrine:

> I own, I am doubtful as to this doctrine, that the King is not bound by a statute unless he is expressly named.

He immediately thereafter, however, cites a case in which it was held that the King was not bound by the 16th section of the Statute of Frauds providing that no writ of *fieri facias* shall bind except from the date of the sheriff's receipt thereof. In Maxwell's Interpretation of Statutes, 5th ed., p. 225, it is stated:

> The provision of the Statute of Frauds, which made writs of execution binding on the goods of the judgment debtor only from the time of the delivery of the writ to the sheriff for execution, was held not to affect the earlier rule of law (which bound the goods from the teste of the writ), where an extent was issued at the suit of the Crown;

citing, *inter alia*, *Giles* v. *Grover*, 1 Cl. & F. 72. Indeed, there now seems no occasion for doubt such as Lord Hardwicke is said to have suggested. Maxwell on Interpretation of Statutes, 5th ed., sums up the rule as follows (p. 220):

> It has been said that the law is *prima facie* presumed to be made for subjects only; at all events, the Crown is not reached except by express words, or by necessary implication, in any case where it would be ousted of an existing prerogative or interest. It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible. Where, therefore, the language of the statute is general, and in its wide and natural sense would divest or take away any prerogative or right from the Crown, it is construed so as to exclude that effect.

The holding in *Rex* v. *Portington*, *supra*, merely follows the now well-settled doctrine of interpretation which is stated in Halsey, Laws of England, vol. 27, pp. 164, 165, 166:

> SEC. 316. The Crown is not bound by the provisions of any statute, unless directly or by necessary implication referred to. It is, however, entitled to the benefit of any statute though not named.
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> SEC. 317. A statute made for the benefit of the crown must be beneficially construed and those restraining the prerogative must be strictly construed.

See also Black, Interpretation of Laws, p. 119, sec. 54; Bishop, Written Laws, sec. 103; *United States* v. *American Bell Tel. Co.*, 159 U. S. 548, 554.

The United States may sue without specific statutory authorization. *United States* v. *Tingey*, 5 Pet. 115; *United States* v. *Bradley*, 10 Pet. 343; *United States* v. *Linn*, 15 Pet. 290; *Jessup* v. *United States*, 106 U. S. 147, 151, 152. In the *Bradley* and *Linn* cases the statute directed an officer to give bond in accordance with the form prescribed. Bonds were given not in the statutory form, and the argument was strongly pressed there, as it was in the court below here, that the contract not made in the statutory form was invalid. It was held that the United States could recover on the common law contract. Yet at the time those cases were decided, 1836 and 1841, the United States could not be sued.

There is no lack of mutuality in the contract because enforcement thereon is granted one party and denied the other. The holdings in the *Bradley*, *Linn* and *Jessup* cases demonstrate that the doctrine that the United States can sue on a valid common law contract, but can not be sued thereon, was considered contrary neither to "good law nor good morals." A contract enforceable by an infant, upon which no remedy exists against him, is nevertheless a valid contract. Similarly, the remedy of specific performance may be available to one party to a contract, and not to the other. *Lumley* v. *Wagner*, 1 DeGex M. & G. 604; *Philadelphia Baseball Club* v. *Lajoie*, 202 Pa. St. 210. The objection that it is

unfair to grant to the Government remedies not available to individuals was answered in *United States* v. *Verdier, supra*, where the court said (164 U. S. 218–219):

> An inherent vice of petitioner's argument is in the assumption that he and the Government stand upon an equality with respect to interest. The truth is that in its dealings with individuals *public policy demands that the government should occupy an apparently favored position.* * * * In short, the equities which arise as between individuals have but a limited application as between the government and a citizen. (Italics ours.)

The situation, then, is this: On a valid common law contract the United States can sue, but in absence of consent can not be sued. The United States can withdraw its consent at any time and couple with its consent any conditions it chooses. *Smith* v. *Reeves*, 178 U. S. 436; *Beers* v. *Ark.*, 20 How. 527. The statute prescribes as a condition to suit against the United States on a contract made with the Navy Department that the contract be in writing, signed by the parties. But the statute is silent as to its effect on the remedy of the Government. There is no indication that the remedy is abrogated, and it therefore remains available to the Government.

The result reached by consideration of the rules of statutory construction, thus, is in full accord with the paramount intent of the Legislature in this statute, to protect the Government against fraud.

## II.

**The signed offer and acceptance in writing constitute compliance with the statute.**

Defendant's offer of transportation by letter of November 13, 1909 (R. 58), and plaintiff's acceptance by telegram of the same date (R. 59), constitute the common law contract, and are both in writing and signed by the parties. The terms of the contract are made clear beyond question by reference to the advertisement for bids (R. 56), and defendant's letter (R. 60) confirming the offer and acceptance.

If copies of these papers were attached and filed with the Returns Office, there can be no doubt that the purpose of the statute would be fully accomplished. Publicity would be given. The terms of the agreement would be clear from the writing signed by the parties. True, both parties would not have signed one page of paper. But each party has signed at the end of his own written undertaking, *i. e.*, his contract.

The section could not have been intended to prohibit absolutely the making of unilateral contracts. Yet, strict adherence to the requirement that the contract be signed by the parties at the end would have that effect. If the War Department, in an emergency dispensing with requirement as to advertising and competitive bids (section 3709, R. S.), offered by signed telegram a price for quick transportation of soldiers at a distance, and acceptance were made not by a promise to furnish, but by fur-

nishing of the actual transportation, the signature by one party at the end of his own written promise should be sufficient. Where the one party has already furnished the consideration, his signature to the unilateral engagement of the other party ought not be required.

If the terms of an offer are completely outlined in a letter of one page signed by the offerer, and the offeree writes immediately below "I accept," signing his name, is not this a compliance with the statute? It would surely be so if the words "I accept" were placed immediately above the signature of the offerer. Yet the words of acceptance have nothing to do with the offer and logically should follow it. Whether the writing is on one page or two pages is immaterial. If the acceptance is written and signed on a separate sheet, *i. e.*, a telegraph blank, as in this case, and later joined for purposes of filing, compliance with the statute is had. The end at which the signature is to be made, it is submitted, is the end of the obligation in writing of the party who signs.

To require one precise form of bilateral agreement to be in one written instrument which both parties must sign would prohibit the quick consummation of contracts by telegraph by the War and Navy Departments, at times when haste often would be most necessary. Such a result is not lightly to be reached. The opposite and sensible result is obtained by sticking not too closely to the letter of the statute, and carrying out its true intent,—full pub-

licity as to all parts of the transaction given by the officer in making the contract.

As was said by the court in *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59:

> Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. *Church of the Holy Trinity* v. *United States*, 143 U. S. 457; *Henderson* v. *Mayor of New York*, 92 U. S. 259; *United States* v. *Kirby*, 7 Wall. 482; *Oates* v. *National Bank*, 100 U. S. 239.

See also *Williams* v. *United States Fidelity Co.*, 236 U. S. 549, 555.

In *Hawaii* v. *Mankichi*, 190 U. S. 197, 213, the court, quoting from *United States* v. *Kirby*, 7 Wall. 482, said:

> * * * "All laws" * * * "should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." A case was cited from Plowden, holding that a statute, which punished a prisoner as a felon who broke prison, did not extend to a prisoner who broke out when the prison was on fire, "for he is not to be hanged because he would not stay to be burned."

In *Johnston* v. *United States*, 41 Ct. Cl. 76, where the point was before the court for decision, the majority said: "It may be admitted that a written contract may be made out under that section [3744 Revised Statutes] by letters of correspondence between the parties." The petition alleged a written contract consisting of a letter by an Army officer reading, "In reply to your proposal of the 6th instant to furnish lighterage and stevedoring [etc.] I have the honor to accept said proposal as follows, with the subjoined conditions" (p. 78). At the bottom of the letter appeared "The above conditions are hereby accepted, E. W. Johnston" (p. 79). A demurrer was sustained by the majority on the ground that the terms of the contract were not set out, but only referred to in the letter.

Barney, J., said (p. 80):

> It is clear that the reply letter of the Quartermaster set out in the petition does not constitute a valid written contract under the provisions of section 3744 of the Revised Statutes, hereinafter quoted. While it may be admitted that a written contract may be made out under that section by letters of correspondence between the parties, we think it hardly needs argument or authorities to show that the letter of one party in reply to another not given does not make out such contract, and particularly so when, as in this case, the reply letter on its face shows it can not be fully interpreted without the other. If the loss of the first letter had

> been alleged, and the substance of its contents given, that would, perhaps, have been sufficient; but to give only one fragment of a correspondence does not make a contract in writing by letter within the statute of frauds, or within the section cited. (13 Am. & Eng. Encyc. of Law, 254.)

On the point here involved the minority did not disagree. Howry, J., said (p. 82):

> If the quartermaster was clothed with authority to contract on behalf of the Government for the lighterage (and as to this there is no dispute), then the correspondence between the quartermaster and plaintiff was a substantial compliance, so far as the latter was concerned, with the requirements of section 3744 of the Revised Statutes for everything contemplated to be done by the plaintiff.

Apparently the writings contemplated by the majority were later furnished, for Johnston was in 45 Ct. Cl. 616 awarded $5,318.30 as "compensation for lighterage and stevedoring."

In *Adams* v. *United States*, 1 Ct. Cl. 192, a tax was levied on the purchaser of goods in certain cases, and the issue was whether a contract with the Navy Department was consummated by letters of offer and acceptance prior to the tax statute, or subsequent thereto by the execution of the formal document for filing purposes. It was held that the contract was completely made by the written letters of offer and acceptance.

In *South Boston Iron Co.* v. *United States*, 118 U. S. 37, and *Monroe* v. *United States*, 184 U. S. 524, the construction of section 3744, Revised Statutes, was really not involved, because in those cases there was no common law contract. In the *Monroe* case the validity of the contract was conditioned upon the approval of an officer, which was never given. In the *South Boston Iron Company* case the proposals were to build such boilers as *may be required, from drawings and specifications to be furnished by the Bureau.* No boilers were ever required, and no drawings and specifications ever furnished. Performance of the whole promise was entirely at the option of one party, and the promise itself was illusory and void. *Campbell* v. *Lambert & Co.*, 36 La. Ann. 35. This was evidently in the mind of the court when it said (118 U. S. 42):

> * * * Within a very few days after the memoranda were made the whole matter was abandoned by the Department, and the Iron Company has neither performed any of the work which was referred to, nor has it ever been called on to do so.

Whatever in *Gillespie* v. *United States*, 47 Ct. Cl. 310; and *McLaughlin & Co.* v. *United States*, 36 Ct. Cl. 138, 37 Ct. Cl. 150, and in the opinions of the Court of Claims in the *South Boston Iron Company* case, 18 Ct. Cl. 165, is contrary to the quoted language of the *Johnston* case, it is submitted, arises from a too close adherence to the letter of the statute and a too slight regard for its controlling purpose.

## III.

**The statute does not apply to executed contracts and is no bar to suit on a parol contract after performance by plaintiff.**

In *United States* v. *Andrews*, 207 U. S. 229, where the War Department had entered into a contract for the purchase of paper to be used by the Philippine Printing Office and to be forwarded to the Philippines, the paper was delivered on board ship according to the contract and was damaged en route. In allowing Andrews recovery of the contract price, the court said (p. 243):

> Lastly, it is urged that in any event the court below erred since the contract in question was not "reduced to writing and signed by the contracting parties with their names at the end thereof," as required by Rev. Stats., §3744. But it is settled that the invalidity of a contract because of a non-compliance with the section referred to is immaterial after the contract has been performed. *St. Louis Hay &c. Co.* v. *United States*, 191 U. S. 159, 163. The contention that the contract in question had not been executed because there had been no delivery, is disposed of by what we have already said.

The contract had been performed by the plaintiff only. Obviously the contract had not been performed by the defendant because the suit was based on the failure of the defendant to perform. Recovery of the contract price was not allowed upon *quantum valebat* as in *quasi ex contractu*. Neither in the

Supreme Court nor in the Court of Claims is any suggestion made of recovery in quasi contract. 41 Ct. Cl. 48. Indeed, it could not have been so allowed because the defendant United States received no benefit which it was unjustly retaining. Quasi contract can be maintained only where the defendant is unjustly enriched and the law implies a promise on the part of the defendant to repay the amount of the unjust enrichment. *Bristol* v. *Sutton*, 115 Mich. 365; *Dowling* v. *McKenney*, 124 Mass. 478; *Banker* v. *Henderson*, 58 N. J. L. 26; *Boone* v. *Coe*, 153 Ky. 233.

Among the cases holding that plaintiff, having performed his side of a contract, unenforceable because within the Statute of Frauds, may recover on the contract may be cited *MacDonald* v. *Crosby*, 192 Ill. 283; *Fuller* v. *Rice*, 52 Mich. 435; *Lagerfelt* v. *McKie*, 100 Ala. 430, 433; *Salyers* v. *Legate*, 93 Ark. 606; *Pearce* v. *Pearce*, 184 Ill. 289; *Walsh* v. *Colclough*, 56 Fed. 778. In *Bibb* v. *Allen*, 149 U. S. 481, the court said (p. 497):

> * * * It is well settled by the authorities that the defence of the statute of frauds cannot be set up against an executed contract.

The case at bar, under the second and third counts, presents a situation parallel to that in the *Andrews* case. If recovery cannot be had on the first count of the complaint for the breach of the executory contract to furnish transportation, the remedy under the second and third counts would not be barred, for the contract therein relied upon has been fully performed.

It is true that the evidence is conflicting as to whether the performance by plaintiff was in pursuance of the defendant's proposition for diversion. But the trial court directed a verdict for the defendant, and for the purpose of determining whether the trial court in thus directing committed error, the plaintiff's evidence must be accepted as true. Parenthetically, it may be stated that upon the first trial without a jury, Judge Mayer accepted the evidence of the plaintiff on this point as true. 197 Fed. 995, 998.

Plaintiff's evidence as to offer and acceptance, thus relied on, is as follows:

On December 9, 1909, the plaintiff wrote the defendant, reminding it that the steamers had to be nominated by December 15 (R. 65). But defendant was unable to fulfill its agreement to furnish the transportation and on December 14, 1909, formally notified plaintiff to that effect (R. 66, 67). In the letter of December 14 the defendant company speaks of its belief in the existence of a combination of ship owners to prevent it from securing tonnage for the December sailings. It states that it was zealous in its efforts to secure tonnage and "for a time it had a standing offer of $4.00 per ton, being 67c per ton more than the company would have received from the Department under its tender" (R. 67, 72). The best terms it could secure were $4.75 a ton (R. 72). Evidencing the desire of defendant to continue on good business relations with the Government, the defendant's attorney said on December 29, 1909, in writing of a penalty to

be imposed by the Department and requesting executive clemency for its failure to perform: "It is the wish of this company to keep faith with the Department" (R. 83). On December 14, verbally, and in its letter notifying of its inability to perform, the defendant submitted to the plaintiff the following proposition (R. 67, 68):

> * * * Inasmuch as we are advised by you that no extension or postponement of loading can be granted, because the coal must be delivered at the Mare Island Navy Yard by the middle of February, in order to supply the Pacific fleet, which will call there at that time, we request you to procure the transportation, which this company formally tendered, either by diverting tonnage already under charter to your Department for other ports, or by securing new tonnage in the general market, provided, of course, that such transportation can be secured by the Department by one of those means at a reasonable cost. I respectfully request that, before any contract is closed for the transportation in question, you will have the goodness to advise me of its terms.

In the light of all the circumstances this writing, reasonably construed and reduced to lowest terms, means: You provide for us the transportation we have tendered, but do it at reasonable cost, release us from our bargain and we will pay you the increase in the cost of transportation.

As to the acceptance: On December 13, 1909, the Paymaster of the Navy Department had entered into

negotiations with the Baker Transportation Company in anticipation of defendant's default (R. 49, 50). This was done in view of defendant's requests for extension of time on December 4 and December 11, and statements as to difficulty in procuring the tonnage (R. 33). Circulars requesting bids for the diversion were sent out on the afternoon of the day of defendant's offer (R. 47). The bids were to be opened on December 18th, and at the opening of the bids defendant's representative was present (R. 50). He was shown the bids, and was asked if the New York and Porto Rico Steamship Company could do any better. He replied that those rates were better than they were able to obtain, and they would have to depend upon the Bureau to supply these two steamers for them (R. 48). Another bid was higher than that of the Baker Transportation Company (R. 48). The next shipment of coal from the Atlantic coast to Mare Island after the diversion was at $4.50 per ton, considerably higher than the rate of transportation for the diverted coal (R. 52). Arrangements for the transportation were made with the Baker Transportation Company on December 18 or 20 (R. 51). Payment to it was duly made on January 28, 1910, for the transportation furnished (R. 52).

The conditions of the defendant's offer in writing of December 14, 1909, were thus fully met. Pursuant to the request, plaintiff did divert 11,388 tons of coal. It paid for the diversion effected. The diverted tonnage was secured at a reasonable cost. According

to plaintiff's evidence, before the contract for the transportation in question was closed, the defendant was duly advised of its terms. The request in defendant's offer to be advised of the terms of the contract for diverted tonnage was, moreover, not a condition of defendant's offer, and was not so regarded in the letter by defendant's attorney who had conducted the negotiations (R. 70, 72).

The contract on which counts two and three are founded is a genuine agreement based upon the intention of the parties. There is here no question of an obligation *quasi ex contractu* imposed by law irrespective of the parties' intent. It is true the promise to pay the increased cost is not in express words, but it is implied from defendant's language and conduct. But this is often the case. When an attorney or physician is requested to perform services, by his performance of the services requested a real contract is effected, and the terms as to payment are implied, not as a quasi contractual obligation but in reasonably construing the agreement of the parties. As Keener on Quasi Contracts states (pp. 4, 5):

> Suppose, however, that A should write to a livery-keeper, simply requesting him to send a coupé to his house at a certain hour, and the coupé was sent and used by A, there would certainly be no express contract, since A has never in words said that he intended to assume any obligation in favor of B. And yet A's conduct speaks quite as loudly as words, and leaves no doubt of his intention to enter

> into a contract with B for the use of the coupé. No one would question that A has communicated such an intention to B, and that he can be fairly said to have promised to pay him for the use of his property, and that to allow A to escape liability would defeat the intention of the parties quite as much as to allow him to refuse to be bound by his contract to sell the horse in the case first supposed.

In *Clark* v. *Waterman*, 7 Vt. 76, defendant called a physician to attend a female who had been brought up in his family, but who after becoming of age worked out in different families. The court held that although a person who may happen to call a doctor may not be liable for medical attendance upon his servant or any one else, still defendant's conduct implied a promise to pay and said (p. 78):

> But there being a request by the defendant, in his own name, upon the credit of which the services were rendered, it is very much as if the defendant had directed a shop-keeper to deliver her goods; and if he had not added, "charge them to me," or "I will pay for them," yet he would be chargeable with what was delivered in consequence; certainly, if by any subsequent act it should appear that he expected to pay for them.

Another case in which a request by A to B to perform services for the benefit of C was held under the circumstances to constitute a promissory obligation on the part of A to pay B the reasonable value thereof is *Best* v. *McAuslan*, 27 R. I. 107. See also *Brink-*

*ley Car Works Co.* v. *Farrell*, 72 Ark. 354. The rule is stated by Lord Esher in *Ex parte Ford*, 16 Q. B. D. 305, 307:

> Whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, and one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted.

The consideration for the contract was ample. Satisfaction of the requested arrangement as to the diverted tonnage (though not the arrangement itself) by payment to the plaintiff of the increased cost would constitute a release from the obligation of defendant's original contract to furnish transportation. Assuming defendant's promise under the first contract to furnish transportation to be unenforceable by reason of the statute, nevertheless a release from such obligation would be binding consideration for a new promise. Consent to the rescission of a contract within the Statute of Frauds is good consideration. *Merchant* v. *O'Rourke*, 111 Ia. 352; *Stout* v. *Ennis*, 28 Kan. 706. Moreover, the plaintiff, the promisee, did what it had a legal right not to do and thereby suffered legal detriment. Upon elementary principles this is valuable consideration. Wald's Pollock, Contracts, 3d ed., p. 167; *Hamer* v. *Sidway*, 124 N. Y. 538.

In the case at bar plaintiff's performance not only furnished the consideration for defendant's obliga-

tion to pay the increase of cost, but at the same time constituted such an executed contract that in suit thereon section 3744 Revised Statutes can not be pleaded as defense.

### CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed, and the cause remanded to the District Court for new trial.

JOHN W. DAVIS,
*Solicitor General.*

ROBERT SZOLD,
*Attorney.*

SEPTEMBER, 1915.

○

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915, No. 44.

THE UNITED STATES OF AMERICA, *Plaintiff in Error,*

*v.*

THE NEW YORK & PORTO RICO STEAMSHIP COMPANY.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

**No. 44.**

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

VS.

THE NEW YORK AND PORTO RICO STEAMSHIP COMPANY.

# BRIEF FOR THE DEFENDANT IN ERROR.

## Statement of the Case.

This case grows out of negotiations between the Navy Department and the Steamship Company with respect to the transportation of coal. It was proposed that the Department should deliver the coal to the company's vessels at a port on Chesapeake Bay, and that the company should transport it to naval depots, on San Francisco Bay.

The United States maintaining that these transactions resulted in a contract claims that it suffered damage to the amount of $10,249.20, because the Steamship Company did not furnish the transportation. The Steamship Company shows, however, that the negotiations did not result in a contract and there being no contract to break, no breach occurred, for which it can be held liable. It is shown, also, that the negotiations contemplated the transportation of

"two cargoes of coal, not less than 4,000 tons each," but the damage claimed by the United States is computed upon 11,388 tons.

The action was brought in the United States Circuit Court for the Southern District of New York on February 24, 1911, and by operation of law (36 Stat. L., 1087, Secs. 289-291) was transferred to the district court, where it has been tried twice. The first trial resulted in a judgment against the Steamship Company, for the sum of $9,679.80 (197 *Fed. R.*, 995). That was reversed by the Circuit Court of Appeals and the cause remanded to the district court for a new trial (206 *Fed. R.*, 443). On the second trial judgment was entered against the United States, on a directed verdict (*p.* 22). It was affirmed by the Circuit Court of Appeals (*p.* 113), and the United States has brought the case to this court, by writ of error (*p.* 117).

In its complaint (*pp.* 4-11) the United States sets up three causes of action: (1) Breach of contract by the Steamship Company, in that it did not furnish transportation in accordance with an offer, made to the Navy Department, which the Department accepted; (2) breach of contract by the Steamship Company in that it refused to indemnify the United States for increased expense to which the Navy Department was put for transportation, procured from a third party, it being alleged that the department procured the transportation for the benefit of the Steamship Company, at its request, and upon its promise to indemnify the United States, and (3) for money alleged to have been expended by the Navy Department, at the request of the Steamship Company for its benefit.

By its answer (*pp.* 12-20) the Steamship Company denied that any contract was made between it and the Navy Department, or that it ever became obligated to furnish the transportation. It denied that the transportation was pro-

cured by the Department for its (the company's) benefit, or that it had promised to indemnify the United States, as alleged. It denied, also, that the department had expended money at its request and for its benefit.

As a separate defense the company showed that the transaction in question was within the operation of Section 3744, Revised Statutes, which requires that in making contracts, the Navy Department and two other Executive Departments of the Government, shall cause the matters agreed upon to be reduced to writing and the formal instrument to be signed by both parties at the end thereof. It renders void and unenforcible all agreements in which these requirements have not been observed. The correspondence and negotiations of the parties mentioned in the complaint did not fulfill the requirements of that statute. The transaction referred to in the informal correspondence was not performed by either party, and in legal effect the negotiations were no more than preliminary memoranda made in contemplation of a contract that was never concluded. There being no contract to break, the breach complained of could not have occurred.

There was no dispute about the facts, on which the United States relied, for proof of the alleged contract, though the United States omitted certain evidence that was produced later by the Steamship Company and conceded to be correct. The proof consisted of a number of letters which passed between the Steamship Company and the Department, but there was no instrument, formal or otherwise, which purported to be a contract, signed by both parties (*pp.* 24-27; 56-83). The letters were admitted by the trial court over the defendant's objection that they did not tend to prove a contract, or an agreement binding upon the parties or either of them.

As proof of the damage complained of, the United States offered communications which had passed between the Department and third parties (*pp.* 84-90). These were ad-

mitted as evidence over the defendant's objection that no breach of contract had been shown and also because they were *res inter alios acta*.

It appears that on November 9, 1909, the Bureau of Supplies and Accounts, Navy Department, addressed a circular letter to a number of firms engaged in shipping, by which each was invited to submit a tender for the transportation of "two or four cargoes of coal of not less than 4,000 tons each," from Philadelphia, or ports on the Chesapeake Bay, to San Francisco (*pp.* 56-57).

The New York & Porto Rico Steamship Company addressed a letter to the bureau in which it offered to furnish transportation (1) for two cargoes of coal, by steamers which would report for loading, prior to December 10, 1909, and (2) for two cargoes, by steamers which would report for loading between December 10th and 25th. The latter service was offered at the rate of $3.33 per ton (*p.* 58). This letter was opened at the Bureau along with other tenders, on November 13th, and on the same day the Paymaster General sent a telegram to the Steamship Company, in which he said that its offer to furnish two steamers for loading between December 10th and 25th had been accepted (*p.* 69). On November 15th, the company wrote to the Bureau, acknowledging the receipt of the telegram and repeating the terms of its tender (*p.* 60). Between that date and November 30, 1909, several letters passed between the parties. The company's letters showed that it was endeavoring to charter steamers, but had not succeeded in securing any (*pp.* 61-64). On December 4th the company's attorney called at the Bureau of Supplies and Accounts, saw the Paymaster, who had the matter in charge, and asked that the time within which the company might report vessels for loading be extended, because there had been an unprecedented increase of charter rates, which the company attributed to a combination, formed among its

competitors to advance the rates, to a point which would compel the New York & Porto Rico Steamship Company either to decline to furnish the transportation tendered to the Bureau and thus be excluded from such competitions in future, or else to furnish it at a loss so substantial that it would refrain from competing again. The Bureau declined to grant the extension, saying that it must have the coal at San Francisco in time to be available for the use of the Pacific fleet, which was expected to return to that port about the middle of February, 1910 (*pp.* 33-45). On December 9, 1909, the Navy Pay Office at Washington, acting for the Bureau, sent the company, for signature, a proposal made out on one of the blank forms which it used, for such purposes (*pp.* 95-108). This dealt with the transportation as though the matter were new and a proper subject for further negotiations. It seemed to have been prepared in contemplation of a service different in many respects from the one concerning which the Bureau and the Steamship Company had been in correspondence. It referred to the subject-matter as the "Transportation of two cargoes—about 12,000 tons," whereas the Bureau's advertisement of November 9, 1909 (*p.* 56) had invited proposals for "transportation of two or four cargoes, not less than 4,000 tons each," and nothing else had been mentioned in the course of the negotiations. Furthermore, the formal proposal blank set forth in considerable detail the terms and conditions upon which the service should be performed, such as the manner in which the expense of loading and unloading should be apportioned between the parties (*p.* 97, *par.* Q); the rate at which the government would discharge the cargoes at the point of destination (*p.* 97, *par.* 7); how lay days should be reckoned (*p.* 97, *par.* 8); how the freight should be ascertained and paid (*p.* 98, *pars.* 10-11); and what should be the status of the parties in the case of disaster (*p.* 99, *pars.* 12-13). In a chapter entitled "Conditions of Contract" it was provided (*pp.* 101-104):

*"In case this proposal shall be accepted,* and the amount of the proposal exceeds five hundred dollars, *contract* to furnish and deliver the articles *must be executed within five days after the receipt of notice of such acceptance. In case the amount of the proposal exceeds five hundred dollars and the time allowed for delivery is in excess of thirty days, the contract must be accompanied by a bond, with satisfactory security.* * * *

* * * The Purchasing Pay Officer may, in case he should so elect, purchase or procure in such manner and from such person or persons as he deems proper, irrespective of the prices to be paid therefor, such of said articles or materials, of the kind specified, as near as practicable, or procure the performance of such services as the contractor shall fail to deliver or perform as required, and may demand and recover from the contractor the difference between the price so paid therefor and the price stipulated in the contract; and the amount of such difference shall be paid by the contractor to the Paymaster General on demand.

In the case of contracts wherein the amount exceeds five hundred dollars it will be agreed that time will be an essential feature of the contract, and that if the contractor shall fail to deliver any or all of the articles or materials, or to perform any or all of the services contracted for, in conformity with the conditions and requirements of the contract, the Government will be damaged thereby, and the amount of said damages being difficult, if not impossible of definite ascertainment and proof, that the amount of said damages shall be estimated, agreed upon, liquidated, and fixed in advance, and the Paymaster General shall make deductions from the contract price of all supplies not satisfactorily delivered or services not satisfactorily performed by the last day of the time fixed therefor by the contract, as follows, viz: * * *."

This proposal form was never signed (*p.* 34).

On December 11th the company's attorney called at the Bureau and renewed his request that the loading dates mentioned in the informal tender be postponed. The company's reason for making that request was repeated substantially as it had been given on December 4th. The Bureau refused to accede to any postponement, repeating its statement that the coal would be needed in San Francisco by the middle of February (*pp.* 33-35; 45).

*On December* 13, 1909, *or two days before the expiration of the time within which the Steamship Company had offered to nominate the vessels,* the Bureau directed a letter to the Baker Transportation Company of New York, a firm engaged in shipping, asking the latter to submit a proposal for the diversion to San Francisco of one or two of its steamers, then under charter to the Bureau, which were at sea, laden with coal, but bound for ports other than San Francisco. On the following day, the fact that this request had been made, by the Bureau, became known by many firms and tended to further increase charter rates. The New York & Porto Rico Steamship Company, at once, advised the Bureau that it could not secure steamers with which to provide the transportation tendered, and requested the Bureau to secure the transportation from other parties. At the suggestion of the Paymaster General the company's attorney put this statement in the form of a letter (*pp.* 34-35). Without promising to indemnify the United States for any additional expense to which it might be put and without conceding that the company could be held responsible in that respect, the letter concluded with the "request that, before any contract is closed for the transportation in question, you (Paymaster General) will have the goodness to advise me of its terms" (*pp.* 66-68). On December 16, 1909, the Bureau replied acknowledging the receipt of this letter and saying that it would advise the attorney "at a later date

as to the best arrangement which *can* be made relative to diverting to San Francisco the two steamers now under charter for other ports, or to obtain or secure these cargoes in open market" (*pp.* 68-69). On December 20th (*pp.* 35, 43) the Paymaster told the company's attorney that he was in the way of arranging for the diversion of two steamers. On December 22d the Paymaster General said that he had made arrangements for the diversion of two steamers and that the cost of transportation to San Francisco would be at a rate 90 cents a ton in excess of the rate mentioned in the tender of the New York & Porto Rico Steamship Company (*pp.* 35, 39). Before concluding this bargain the Bureau had not advised the Steamship Company about its terms, and nothing had been said by either party with respect to the liability of the company to indemnify the United States for any loss that it might sustain (*p.* 43). On receipt of the company's letter of December 14th in which it announced that it could not furnish the transportation, the Bureau issued a second circular letter to a number of shipping firms, inviting tenders to be opened on December 18th, for the transportation of "two or four cargoes of coal of not less than 4,000 tons each," from Chesapeake Bay ports to San Francisco, the *"vessels to stop at Punta Arenas for orders regarding destination"* (*pp.* 84-86). Nine bids, received in response to this invitation, were opened on December 18th. Six of them specified loading dates between January 5th to March 1, 1910. The lowest offer was for the diversion of one vessel, then under charter to the Bureau and bound for Cavite. The rates quoted by others ranged from $5.10 to $7.90 per ton. All of these offers were rejected (*pp.* 84-86).

Meanwhile the Bureau had continued the negotiations, begun with the Baker Transportation Company *on December 13th* (*p.* 87) and the Baker Company had finally made an offer to divert two steamers to San Francisco. This was

accepted by the Bureau on December 18th (*p.* 87). On December 21, the Navy Pay Office at New York sent the Baker Company an unsigned memorandum purporting to be an amendment of a contract between that company and the Bureau, dated August 31, 1909. The effect of the amendment was to change the destination of two steamers from Honolulu to San Francisco in consideration of an increase of the Baker Company's compensation at the rate of 85 cents per ton. At the increased rate thus allowed the Baker Company, the cost of transporting 11,388 tons of coal laden on its steamers came to $10,384.20 more than the cost of transporting an equal amount, at the rate named in the informal tender of the New York & Porto Rico Steamship Company (*p.* 93). On December 23d the Baker Company acknowledged the receipt of the Paymaster's letter, saying that the modification of its contract, thus proposed, would be satisfactory to it (*p.* 90). The amendment appears to have been sent to the Returns Office of the Interior Department and received there December 27, 1909 (*p.* 94).

Telegrams received by the Bureau from its representative at Honolulu indicate that one of the Baker Company's vessels sailed from that port for San Francisco on December 20th, or two days before the Paymaster General told the Steamship Company that he had completed an ar[illegible]nent for the diversion and three days before the B[illegible]ansportation Company assented to the amendment [illegible]s contract. The other steamer left Honolulu on December 28th (*p.* 88). It is conceded that the first steamer reached San Francisco on January 4, 1910, and the second on the 8th of the same month, and that the Department paid the Baker Company for the diversion on January 28th.

On December 24, 1909, the New York & Porto Rico Steamship Company being advised that the case had been

referred to the Assistant Secretary of the Navy, asked the latter for an opportunity to be heard on questions that might be raised with respect to its liability (*pp.* 69-70). A hearing was granted on December 29th (*p.* 27), at which the company took the position that no contract had been made; that the company never became obligated to furnish the transportation and could not be required to indemnify the department for any expense to which it might be put; but even if the case were such that the company could be held liable at all, the damage recoverable by the Department could not exceed the additional cost of transporting 8,000 tons of the coal. The company expressed a disposition to adjust the matter with the Department, if that could be accomplished on terms that it considered reasonable. In suggesting an adjustment it showed that anything of the kind would be voluntary on its part, and that if the positions of the parties were reversed—*i.e.*, if the company had reported vessels for loading, but meanwhile the Department had concluded that it did not want the coal transported, the company could have had no redress or indemnity (*pp.* 70-83).

There is some conflict in the testimony with reference to the purpose for which the Baker Company's vessels were diverted to San Francisco, but that does not affect the issue about the existence of a contract between the Department and the New York & Porto Rico Steamship Company; or the existence of an obligation on the part of the Steamship Company to indemnify the United States. The United States contends that the diversion was made to take the place of the transportation which the Steamship Company tendered but did not furnish, and that arrangements for it were made at the request of the Steamship Company, contained in the letter written by its attorney on December 14, 1909 (*p.* 66). The Steamship Company contends that it was not, showing (1) that the arrangement between the

Bureau and the Baker Company was the result of a negotiation, which was begun by the Bureau *on December 13th, or the day before the New York & Porto Rico Company's letter was written;* and (2) that the diversion was procured for the benefit of the Navy Department alone, without reference to any communication that passed between the Bureau and the Steamship Company. The contention of the Steamship Company is borne out by the facts while that of the United States is not. The facts are: Early in November, 1909, the Bureau of Navigation had requested the Bureau of Supplies and Accounts to provide 30,000 tons of coal at San Francisco to be available for the use of the Pacific fleet, on its return to San Francisco Bay in February, 1910 (*pp.* 44, 91). In compliance with this requisition the Bureau of Supplies and Accounts sent out its circular of November 9, 1909 (*supra*), and thereafter by telegram accepted the Steamship Company's offer for the transportation of two cargoes of coal *"of not less than* 4,000 *tons each."* About the same time the Bureau accepted offers received from two other firms for the transportation of one cargo each, thus making tentative arrangements for the transportation of four cargoes, aggregating about 16,000 tons, and apparently leaving some 14,000 tons for which transportation was to be provided (*p.* 92.) The Bureau then had upwards of 11,000 tons of coal, laden on the Baker Company's vessels, which had sailed from Hampson Roads in October and were bound for Honolulu. The diversion of the 11,000 tons to San Francisco would help to make up the 30,000 tons needed at that port. Again, it is not plausible to say that the diversion of the Baker Company's vessels was arranged to take the place of tonnage that the Department expected the New York & Porto Rico Steamship Company to supply. Steamers of the class employed in that trade made the voyage from Hampton Roads to San Francisco in from 65 to 75 days (*pp.*

45; 96-97). Such a steamer sailing from Chesapeake Bay on December 25, 1909, could not reach San Francisco before the early part of March or from two to three weeks after the date when the Pacific fleet was expected to return to the latter port, whereas the Baker Company's steamers, having sailed from the Chesapeake in October, were due to reach Honolulu during the latter part of December, and could make the voyage from Honolulu to San Francisco in about 12 days, reaching that port during the early part of January (*p.* 45). Again: The negotiation between the Bureau and the Baker Company was opened by the Bureau without notice to the New York & Porto Rico Steamship Company two days before the expiration of the period within which the latter had offered to nominate its steamers, and the day before the Bureau was notified that they would not be nominated.

The New York & Porto Rico Steamship Company being under no obligation to furnish the transportation, it is not apparent how the diversion of the Baker Company's steamers can be regarded as a consideration received by it for undertaking to indemnify the United States. Obviously the delivery of coal at San Francisco was a matter of concern to the Bureau, but to the Steamship Company it could have made no difference whether the Department's coal were carried to San Francisco or remain at a Chesapeake port.

In the court below the case turned upon the question, whether there were a contract between the parties, or not. The transaction was held to be within the statute (Sec. 3744, R. S.), and inasmuch as the requirement of the statute had not been observed, the court decided that no contract was made and no obligation was assumed by either party which the other could enforce (*pp.* 118-120).

The United States assigns as error that the Circuit Court of Appeals declined to hold that the transactions resulted

in a contract, or at least, in something which could be enforced by the Government at its pleasure. Also that the court erred in holding that the correspondence produced did not fulfill the requirements of the statute, and did not constitute a valid contract (*p.* 115).

For reasons which will be developed more fully in his brief, the Steamship Company contends: (1) The interpretation placed upon Section 3744, Revised Statutes, was correct, and the one which the courts have always placed upon it. There was no contract. (2) The Navy Department and other executive departments, named in the statute, have adapted their business methods to conform with the requirements of the statute and have been consistent in giving it the construction placed upon it by the courts. (3) The effect given the statute cannot be varied from time to time to accommodate the business interests of the United States as they may vary in particular transactions. (4) The transportation procured by the Navy Department was procured for its own benefit and not for the benefit of the Steamship Company, and the company being under no obligation to furnish it, was under no obligation to indemnify the United States.

## Argument.

### I.

> The breach of contract complained of could not have occurred, for there was no contract to break. The company never became obligated to furnish the transportation or to indemnify the United States.

Each of the three causes of action pleaded in the complaint is founded on the assumption that the transactions of the parties resulted in a valid and enforceable contract. That assumption is contrary to law and cannot be entertained. The transactions of the Navy Department and its

several bureaus are governed by special rule, created by statute, which is totally different from the rule which governs similar dealings between individuals, or between individuals and executive departments of the government other than those of War, Navy and the Interior. The statute drawn in question (*Sec. 3744, R. S.*) is a re-enactment of one portion of the act of Congress, approved June 2, 1862, entitled: *"An act to prevent and punish frauds on the part of officers entrusted with the making of contracts by the government"* (12 *Stat. L.*, 411). It reads:

> SEC. 3744. It shall be the duty of the Secretary of War, *of the Secretary of the Navy,* and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, *to be reduced to writing, and signed by the contracting parties with their names at the end thereof;* a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return."

If it were permissible for us to resort to the record of debates in Congress, little or no information could be obtained from that source about the purpose of Congress in passing the act of June 2, 1862. In the House of Representatives the bill passed without debate. In the Senate the few remarks, made, were to the effect that the purpose of the legislation was to protect the United States against the

perpetration of fraud *by its officers in its military service, and to protect citizens against frauds of those officers, through unjust discrimination in the letting of contracts.* (*Congressional Globe, Vol.* 31, *pp.* 276, 369, 390, 403, 421; *and Vol.* 32, *p.* 206).

The section in question has been interpreted frequently by the courts.

Soon after its passage, it was held to be and was enforced as a statute of frauds, *operating upon the transactions themselves rather than upon the parties to them* and rendering absolutely void and unenforceable all dealings in the nature of agreements made otherwise than in conformity with the procedure described in the statute. This interpretation has been adhered to, consistently during the period of more than fifty years, which has intervened since the act was passed.

The leading case in this court is that of *Clark v. United States* (95 *U. S.*, 539). Clark brought suit in the Court of Claims for the agreed value of his steamer, which had been lost while in the service of the government, and also for compensation at a stipulated rate for her use from the time when she was taken into the service of the government until she was lost. Conclusive proof was offered of a verbal agreement between Clark and an officer of the Quartermaster's Department, U. S. Army, which had received the verbal approval of the general commanding the military division of Texas. By this it had been agreed that the War Department would take over the steamer and man and operate her, paying Clark for her use, at the rate of $150 a day while she should be engaged in making a trial trip, to be held for the purpose of determining whether she were available for the service in which the Department desired to employ her; also that if the steamer should be lost while making the trial trip the United States would pay Clark a sum representing her value as appraised by three disinterested

persons, to be appointed by the parties. It was further agreed that no formal charter or contract for the use of the steamer would be made until the completion of her trial trip. Clark delivered the steamer to the Quartermaster's Department and she proceeded on her trial trip, officered and manned by persons employed in the military service. Eight days later, and while still engaged in making the trial trip, she was wrecked and became a total loss. The Quartermaster and Clark evidently regarded their informal agreement as valid and binding, for they appointed three persons to appraise the value of the vessel. The appraisers reported that she was worth $60,000 and the evidence offered at the trial showed that that was reasonable. Thereafter the government refused to pay Clark anything, either for the loss of his steamer or for her use, claiming that the transaction was absolutely void because the agreement had not been reduced to writing and signed by the parties in the manner prescribed by the act of June 2, 1862 (Section 3744, Revised Statutes). The Court of Claims upheld the government's contention and dismissed the petition. On appeal the Supreme Court affirmed the judgment in all respects, except that it held that Clark might recover compensation, on *quantum meruit*, for the use of his vessel during the eight days that the government had her. Clark was allowed nothing for the loss of his steamer. Mr. Justice Bradley, delivering the opinion of the court, said (*p.* 541):

> "It is contended on the part of the Government that this Act is mandatory and binding both on the officers making contracts and on the parties contracting with them; whilst the claimant insists that it is merely directory to the officers of the government, and cannot affect the validity of contracts actually made, though not in writing. The Court of Claims has heretofore held the Act to be mandatory, and as requiring all contracts made with the departments named to be in con-

formity with it. The arguments by which this view has been enforced by that court are of great weight and, in our judgment, conclusive. The facility with which the government may be pillaged by the presentment of claims of the most extraordinary character, if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the government should be in writing. *Perhaps the primary object of the statute was to impose a restraint upon the officers themselves, and prevent them from making reckless engagements for the government; but the consideration referred to makes it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than this. And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make contracts in any other way than by writing, signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part.* Such a party aids in the violation of the law. *We are of opinion, therefore, that the contract itself is affected and must conform to the requirement of the statute until it passes from the observation and control of the party who enters into it.* After that, if the officer fails to follow the further directions of the act with regard to affixing his affidavit and returning a copy of the contract to the proper office, the party is not responsible for this neglect."

With regard to Clark's right to recover on *quantum meruit*, for the use of the steamer, the court said:

"The *special contract* being *void*, the claimant is thrown back upon the rights which result from the implied contract."

On the first trial, the district judge accepted the government's contention and held (197 *Fed. Rep.*, 999) that in denouncing informal agreements as "void" this court did not really mean "void" in the strict sense of that term, but used the term as a synonym of "voidable." We submit that the Circuit Court of Appeals was correct in holding that to be error, for this court said that it was a statute of frauds and, as such, operated upon the transaction, rendering it void.

Counsel for the United States now contend that a verbal agreement is not void, but merely voidable at the option of the United States, and that such was the ruling of this court in Clark's case. That is not tenable, for the court said, clearly, that the making of an agreement otherwise than in conformity with the law was forbidden by it, and unless so made an agreement could not be recognized as valid or effective for any purpose. Later decisions are more emphatic in denouncing informal agreements as absolutely void. This is no more than an application of the principle stated long ago in the case of *Russell v. Le Grand* (16 *Mass.*, 35):

> "The rule of law is of universal operation that none shall by aid of a court of justice obtain the fruits of an unlawful bargain."

The interpretation that the government now asks the court to place upon the statute and the one which the district judge placed upon it, would give it an effect quite the opposite of that indicated by its terms and quite inconsistent with the ruling of this court. If it were interpreted to mean that informal transactions should be *voidable* at the option of the government it would neither operate upon the transactions nor would it impose a duty upon the government's contracting officers. It would leave the government and

its agents free to do as they pleased. They might treat any transaction as valid or invalid, as suited their fancy. The whole burden of the requirement would devolve upon the individuals, while they would be powerless to compel its observance.

Undoubtedly, Congress, had it so elected, could have enacted a law which would have made agreements, voidable at the option of the government unless reduced to writing and signed by the parties, but valid and enforceable against individuals from the acceptance of their proposals. The Steamship Company does not deny that Congress could have done so, but insists that it did not, and that it is not competent for a court to convert Sec. 3744 into something different from that which Congress expressed and intended. This was well stated by Judge Coxe delivering the opinion of the Circuit Court of Appeals (*p.* 120):

> "We have nothing to do with the policy of the law, whether wise or unwise; we take it as we find it and construe it according to the obvious meaning of the language employed. The question is not what the law should be, but what it is; and that question, in view of the interpretation of the Supreme Court, is not, in our opinion, open to doubt. If Congress wishes the agreements between the Navy Department and individuals to depend on oral testimony, it has only to repeal or modify the statute in question; this court can do neither."

If anything were needed to show that this court meant to decide exactly what was said in Clark's case, we have only to turn to the dissenting opinion. Mr. Justice Miller speaking for himself and the two justices who concurred in his dissent, said (*pp.* 544-546):

> "* * * I cannot agree to the more important part of the opinion, which holds the contract *void*, because it was not reduced to writing.

The act of June 2, 1862, which is interpreted by the court to be a statute of frauds, making all contracts of the Departments of War, Navy and Interior *void* which are not reduced to writing and signed by the parties is not, in my judgment, properly construed.

It cannot be doubted that it was competent for Congress to impose upon the officers of these departments the duty of having all their contracts made in writing and filed in the proper office without making absolutely *void* a parol contract made on a fair consideration and within the scope of their authority. In other words, Congress had a right to give such direction to those officers as would secure a statement in writing of the contract itself, for the use of the proper officers of the government, without making it obligatory on the individual contracting with the government, so that his contract, otherwise valid, would be *void* for want of that formality. * * *

Looking at Section 1 of the statute, as it is cited in the opinion of the court, it will be found wanting in the essential words of all known statutes of fraud.

There is no declaration that a parol contract shall be *void or that it shall not be enforced, or that no suit may be sustained on it.* * * *

It seems to me that if Congress had been intending to enact a statute of frauds, they would have made some limitation of its operation to cases of future delivery of property or future performances of service, and would not have passed a statute like this, which, if its effect is such as the court declares, renders *void* all contracts for compensation for the thousand small services and supplies which are daily needed by those in the employment of the government for its use."

From this we see that the contention now advanced by the Government is not new. It was the view held by the minority in Clark's case, but the majority took the opposite view—thus leaving no room to doubt that when the majority of the court said that the statute rendered *void* all

agreements not reduced to writing and signed by the parties it meant *void* and not something else.

*South Boston Iron Company v. United States* (118 *U. S.*, 37.) Alleging a contract between it and the Navy Department and breach by the latter, the Iron Company brought suit for damages, claiming $75,000 as losses sustained, and $143,264.06 as profits prevented. To maintain its case the company produced correspondence which had passed between it and the Chief of the Bureau of Steam Engineering. From this it appeared that the company offered to furnish certain materials, to be manufactured by it in conformity with plans and specifications which had been provided by the bureau, and that this offer was accepted by the Chief of Bureau. In short, the proof showed everything essential to the creation of a valid contract between individuals, or between an individual and a department of the government other than one of the three named in Section 3744. The issue was whether the correspondence was the equivalent of a contract reduced to writing and signed by the parties, with their names at the end thereof. The Court of Claims dismissed the petition holding that the offer, acceptance, and other correspondence, did not fulfill the requirement and had not created an obligation which the law would recognize. On appeal this court affirmed the judgment of the Court of Claims, saying (*p.* 42):

> "The Court of Claims held that the provisions of Revised Statute Sec. 3744, which requires all contracts made with the Secretary of the Navy 'to be reduced to writing, and signed by the contracting parties with their names at the end thereof,' was mandatory, and that contracts which did not comply with its requirements were *void*. * * * An effort has been made in this case to show a contract in writing, but we agree entirely with the Court of Claims that *the papers relied*

*on for that purpose are nothing more in law or in fact than the preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law. This was never done and therefore the United States never became bound.*"

In *Monroe v. United States* (184 *U. S.*, 524), the contract sued upon had been reduced to writing and signed by the claimant and also by the government's representative who had conducted the negotiations. It was provided in the contract that it should be subject to the approval of the Chief of Engineers. He had signified his approval of the instrument in a letter written to the contracting officer before the instrument was signed and directed the officer to sign it and the latter had done so, but when it came to him for signature, he refused to sign it. The court held that the instrument did not meet the requirement of the statute. In part, the opinion reads:

"We agree with counsel that the question in the case is a narrow one. It is not denied that the approval of the Chief of Engineers was necessary to the legal consummation of the contract. It is, however, insisted that the approval was not required to be formally expressed, but could and did consist of acts preceding the written instrument, though the latter contained the terms and covenants of the parties. *In other words, it is contended that the advertisement, claimant's bid made under competition, which was submitted to the Chief of Engineers, who, after some correspondence with the engineer in Chicago in relation thereto, had in writing directed it to be accepted, the preparation of the formal contract on the blank furnished by the Chief of Engineers, its execution by both the officer in charge and the claimants, in due form and in strict accordance with the provisions of Sec. 3744 of the Revised Statutes, constituted an approval.*

*We are unable to assent to this view. It is the final written instrument that the statute contemplates shall be executed and signed by the parties, and which shall contain and be the proof of their obligations and rights.* And it was such written instrument that was to be approved by the Chief of Engineers. The approval was to be a future act. The provision of the contract was: 'This contract (that is, the instrument to which the contracting officer and the claimants attached their signatures and seals) shall be subject to approval of the Chief of Engineers of the U. S. Army.' The approval, therefore, did not consist of something precedent, but was to consist of something subsequent. *That which preceded was inducement only, and contemplated an instrument of binding and remedial form,* and hence to contain covenants, imposing obligations and giving *rights and remedies*, containing provisions for the time of performance and the manner of it; provisions for changes and for extra work—indeed, of the provisions which prudence and necessity require and those which the statutes of the United States might require. And the final right to see that this was done, the parties agreed should be devolved on the Chief of Engineers, and it was not satisfied by prior instructions."

The reasoning by which the court arrived at this decision when applied to the facts now under consideration can lead to no conclusion other than that the correspondence produced does not prove a contract or the creation of any obligation, that the government can enforce. In the Monroe case a formal instrument had been prepared in which were recited all covenants of the parties, essential to a complete expression of their agreement. The instrument itself had been signed by the contractor on the one hand, and on the other by the officer who represented the United States, in the transaction, and who signed the paper in obedience to instructions given him by the Chief of Engineers. In the

case at bar we have far less in the way of proof. There is (1) a circular letter issued by the Bureau to several shipping firms inviting them to make tenders of a service which is described in very general terms; (2) a tender of the most informal nature; and (3) an acceptance transmitted by telegraph. It is manifest that until the Department became apprehensive that the Steamship Company might not provide the transportation, it did not regard these as constituting a contract, for about a month after the tender and acceptance, and after the Steamship Company had told the Department about the difficulty that it was experiencing in its effort to secure tonnage, the Department sent to the Steamship Company for signature by it, a formal proposal by which the company would have tendered a service, exactly 50 per cent greater than the service mentioned in the Bureau's advertisement or contemplated by the company's bid. Furthermore, the proposal form furnished by the Department named several conditions under which the service should be performed which were not set out in the Department's circular or in the company's bid and had not been mentioned in the correspondence which had passed between the parties. A very significant feature of the paper was the statement that the award of a *contract for the transportation would depend upon the acceptance of the formal proposal* (*p.* 101).

In the case of the *St. Louis Hay & Grain Co. v. United States* (191 *U. S.*, 159), it appeared that claimant had engaged to supply the War Department with some nine million pounds of hay. The engagement was not reduced to writing and signed in the manner required by Sec. 3744, Revised Statutes. After part of the hay had been furnished and accepted the government's purchasing officer directed the claimant to suspend deliveries, but later and after the price of hay had risen he ordered the claimant to resume

them. The claimant asked to be relieved from doing so but this was refused, and he furnished the hay. The government paid him for it, at the rate named in the informal agreement. After the transaction had been fully performed by both parties, claimant brought suit, seeking to recover as upon a *quantum meruit*, the difference between the value of the hay when delivered and the sum that the government had paid for it. In his brief the Assistant Attorney General argued (*Transcript of Records and File Copies of Briefs*, 1903, vol. 8, *pp.* 4785, 4787):

> "In this case the parties entered into an agreement in writing *which contained all the elements of a contract, but which was not binding upon nor enforceable by either party, because not made in conformity with the provisions of Section* 3744, *Revised Statutes.* * * * We have, then, a contract between the parties which came within a special statute of frauds relating to contracts with the United States, *and which for that reason could not be enforced* BY EITHER PARTY."

The court held that there was no contract between the parties which the law could have recognized as obligating the claimant to furnish the hay or the government to pay a stipulated price for it or to accept it at all; but the transaction having been fully performed the law would not reopen it at the instance of either party and there could be no recovery on *quantum meruit*. Mr. Justice Holmes delivering the opinion of the court said (p. 163):

> "The claimant delivered the hay and received full payment for it under a contract without protest or attempt to reserve any rights at that time. * * * *Although no doubt both parties supposed their agreement binding the Court of Claims held, and it is not disputed, that the contract was within Revised Statutes*

3744 *and not having been reduced to writing and signed by the contracting parties with their names at the end thereof could not have been sued upon if it had not been performed.* * * *."

Not only the language actually used by Mr. Justice Holmes, but also the manner in which he approached the decision, shows that he agreed with the argument advanced by the Attorney General and now advanced by the Steamship Company, namely, that a contract, while executory, was unenforcible by either party. Had Mr. Justice Holmes' view been the one urged by the Government in the present case, all that it would have been necessary for him to say in disposing of the Hay Company's claim upon *quantum meruit* would have been that, while the parol contract was unenforcible against the Government, it was binding upon the company, and in furnishing the hay under the agreement it did only what it was legally obligated to do, and having received the contract price, it could have no further claim against the Government. Instead of disposing of the case in that manner, Mr. Justice Holmes thought it necessary to consider whether the company was not precluded from asserting a claim upon *quantum meruit* by its acceptance of payment in conformity with the parol agreement, although that agreement was void and unenforcible.

The government appears to rely to a considerable extent upon some expressions contained in the opinion of this court in the case of *United States vs. R. P. Andrews & Co.* (207 *U. S.*, 229), where a judgment of the Court of Claims in favor of the Andrews Company was affirmed, although the agreement in suit had not been reduced to writing and signed by the parties in the manner provided by Section 3744 R. S. Judgment was for the agreed price of paper furnished to the government, and not, as the government

now states (Brief, p. 7), damages for breach of contract. A review of the case shows that the government is attaching an importance to a sentence contained in the opinion of this court that it was not intended to possess, and a meaning that it was not intended to convey. From the report in the Court of Claims (41 C. Cls., 48) it appears that the government did not raise any question about the form of the contract, and no mention of anything of the kind is to be found in the opinion of that court. Apparently a defense upon that ground was raised, for the first time, in this court on appeal, where it was met with the statement:

> "But it is settled that the invalidity of the contract because of the non-compliance with the section referred to (Sec. 3744 R. S.) is immaterial, for the contract has been performed (*St. Louis Hay & Grain Co. v. United States*)."

In the present case there was no engagement performed by either party. The government has not paid the Steamship Company any money or performed any service for the company's benefit.

In the Andrews case the court spoke of the transaction sued upon as a "contract." To be sure there was no formal instrument and the only evidence of an agreement between the parties was found in correspondence that had passed between them, and in the fact that the Andrews Company had shipped the goods in conformity with its bargain and there had been a constructive acceptance of the goods by the government. There was evidence that the goods were fairly worth the sum mentioned in the correspondence and claimed by the Andrews Company, for it was conceded to be the price that the Government Printing Office paid for similar goods, plus freight to destination. Under these circumstances the court may well have held that it was not

material whether the petition set up a claim upon express contract or upon a contract implied from the informal bargain followed by the delivery and acceptance of the goods. Suit would have been maintainable in either case.

Before Clark's case was decided by this court, the statute was drawn in question in several cases adjudicated by the Court of Claims, where it was interpreted in the same way. *Henderson v. United States* (4 *C. Cls.*, 75, 81-84):

> "But the law having required that such contracts shall be so reduced to writing, makes it as much the duty of the contractor as of the officer to see that this requirement is fulfilled. * * * The words of the statute are positive and peremptory. The Secretaries of War, Navy and Interior shall cause and require every contract made by themselves or their subordinates to be reduced to writing and signed by both parties. The necessity and importance of such a provision to the government, in preventing mistake, imposition and fraud, can scarcely be overestimated. * * * Besides this, Congress, by an act passed on the 17th July, 1862, provided 'that the operation of the act entitled 'An Act to prevent and punish frauds on the part of officers, entrusted with making contracts for the government,' approved June 2, 1862, be and the same is hereby suspended until the first Monday of January, 1863.' If the enactment had been regarded by Congress as merely directory, no such law would have been passed; but it is evident from these subsequent enactments, as well as from the language of the law itself and the purpose of its enactment, that Congress deemed it essential in its character and mandatory in its requirements. If this requisite, so explicitly and expressly commanded, may be dispensed with as a mere direction, without being obligatory in one case, it may in all cases. If one executory contract need not be in writing, all may be verbal or informal. * * * There is and can be no hardship in requiring everyone deal-

ing with an officer or agent of the United States to take notice of the provisions of a public statute enacted upon the subject. It is the business of everyone so dealing to see that the public agent with whom he is negotiating is acting within the scope of his powers. If the transaction were with a private agent, he would be bound to do so, and there is no reason why the rule should be relaxed in relation to public officers. But, on the contrary, every consideration of public convenience, policy and morality require that it should be strictly adhered to and enforced.

I cannot consider this provision in the act of 1862 as merely directory. A matter of such great public importance was never intended to be left to the discretion of those whose conduct it was intended to control and regulate. It is true that there are no negative words in this part of the statute. No provision is inserted that verbal contracts shall be null and void. Nor do I apprehend that such words or such a clause was necessary to make it imperative. 'Where affirmative words used are peremptory, the provision cannot be held as directory.' (*Davidson v. Gill*, 1 *East*, 64)."

Before passing from the consideration of this case, it is opportune to comment on the earlier case of *Adams v. United States* (1 *Ct. Cls., N. & H.*, 192), which is relied upon by the United States (Brief, p. 29). In the first place, that decision does not sustain the contention that the government is making, namely, that the effect of Sec. 3744 R. S. is to make a bargain obligatory upon and enforceable against an individual from the acceptance of his offer, but not valid and enforceable against the government until a formal paper embodying the terms of the agreement shall have been reduced to writing and signed by both parties. The Court expressed quite the opposite view on that point:

"The provisions of the several acts of Congress requiring advertisement, inviting proposals for supplies in the departments, appear to have been fully complied

with. But there is nothing in those acts from which it can be legitimately inferred that Congress intended that the United States should not be bound by its acceptance of the offer made in such case, but that the other party should be. In other words, that the contract should not take effect as to both parties at the same time; that the contractor should be bound from the date of acceptance, and the United States from the date of the written contract, executed afterwards. This would contravene all our notions of a contract derived from the common or civil law, or from the usage of mankind and the course of business. The binding force and efficacy of a contract begins to operate on both parties at the same instant. To be a contract at all it must be mutual, and it cannot possess mutuality if there is any period or instant when it binds one party and not the other.

"The act of 2d June, 1862, requiring officers making contracts to sign them at the end, make affidavit of their correctness, and file a copy of each of such contracts in the returns office, have nothing to do with the case. The law does not make the doing of those things prerequisite to the validity of the contract, nor would the failure of the officer to perform his duty in this respect affect the validity of the contract either so far as the claimant or the United States was concerned. It would subject him to penalties prescribed in the act for neglect or dereliction of his duty; and, indeed, was intended as a better security to the United States against the fraud and collusion of their own officers."

Again, the question at issue in the present case was not raised or decided in Adams' case. In Henderson's case (*supra*), the court, speaking by the same judge who had delivered the opinion in Adams's case, said this:

"These views do not in the least conflict with our decision in the case of Chas. H. Adams, 1 N. & H. (C. Cls.), 192. In that case, the contract was in writing and

signed by the parties. The only question was in regard to its verification and return to the returns office. These latter things we held to be mandatory on the officer, alone, who made the contract; and their omission by him, while it made him amenable to the penalties prescribed by the act, did not invalidate the contract itself. They were to be the acts of the officer alone, after the contract should be executed and completed, and over which the other party could exercise no control, and for which he ought not in any way be held responsible. To these views we adhere, and only hold the contract to be unavailable because it was not reduced to writing."

The case of *Danolds v. United States* (5 *C. Cls.*, 65) grew out of a parol agreement between the claimant and Cavalry Bureau, United States Army. Claimant offered to furnish a certain number of horses on a certain day at a certain rate. He tendered them agreeably to his offer, but the bureau refused to receive them. Subsequently the bureau agreed to take and pay for them if the claimant would winter them. To this proposition the claimant assented. With the exception of a few that had died during the winter, claimant tendered the horses to the bureau in the following spring. Some of them had been injured during the winter and those the bureau declined to accept, and refused also to reimburse the claimant for the expense to which he had been put for wintering them, whereupon claimant brought suit for breach of contract. The United States contended that there was no contract, and therefore no obligation had been assumed by the United States which could have been broken by it. The court dismissed the petition, saying:

"The construction given to that act (§ 3744, R. S.) by this court is that the act is mandatory and obligatory

upon the contractor as upon the officer. The *oral agreement*, therefore, with Captain Fuller, as an executory contract, *was void*.

The statute also extends not merely to quartermasters and ordinary purchasing officers, but to all officers in War, Navy and Interior Departments, and to the Secretaries themselves. It also embraces '*every contract made by him*.' The Chief of the Cavalry Bureau was invested with ample power and complete discretion by the War Department over the subject-matter of the contract, *but no power or discretion which the War Department could give would authorize him to legally bind the defendants in an illegal way*. It is, therefore, evident that the claimant's further oral agreement with the Chief of the Cavalry Bureau was, likewise, as an executory contract void.

But this court has held that the act of 1862, is, as between the government and its contractors, a statute of frauds. It does not prohibit contracts but only regulates the manner of making them. Performance on the one side and acceptance on the other are, to a certain extent, sufficient to take a case out of the prohibition of the statute and to leave it within the equitable rule of implied contracts. *If in this case there was a faithful performance on the part of the contractor, and a benefit received on the part of the government, there is no reason why it should not operate as a legal ratification by the defendant of the agreement.* * * * On the contrary, *if the* claimant in the spring ignored his *unbinding bargain* of the fall before, selling to the defendants by a new agreement and receiving a better price, there can be no propriety in the court affirming a transaction which the claimant has himself ignored."

In speaking of the claimant's parol agreement as his "*unbinding bargain*" the court could have meant nothing less than that such agreements are *void*, and not merely voidable at the option of the government.

In its more recent decisions the Court of Claims has ad-

hered to this interpretation of Section 3744, R. S., and has given it the same effect. In *McLaughlin v. United States* (37 *C. Cls.*, 150, 185), it was said:

> *"This statute is mandatory. Operative as a statute of frauds, it makes contracts not reduced to writing and signed by the contracting parties void.*
>
> *The preliminary advertisements, specifications, and proposals and acceptance of proposals must be viewed as becoming a part of the statutory contract when a contract was executed as required by statute, but until then only the negotiations necessary to the execution of a formal contract. The exception noted in the books that a parol contract wholly or partly executed on one side entitles the party performing to recover the fair value of his property or service as upon an implied contract for a quantum meruit has no application here."*

*Johnson v. United States* (41 *C. Cls.*, 76) is another case well worthy of consideration. It grew out of negotiations between the claimant and a Quartermaster of the Army with reference to the unloading of certain vessels which were in the service of the War Department. The claimant had submitted an offer to unload the vessels, and had received a letter from the Quartermaster which contained an acceptance of the offer and named various conditions under which the service should be performed. Furthermore, the sheet on which the Quartermaster's letter was written was provided with a blank form, intended to be signed by the other party, reading: "The above conditions are hereby accepted," and the claimant had signed it. Though not in the form commonly used for official contracts, the official letter and endorsement, all on one sheet of paper, represented the agreement of the parties, and furnished evidence of their assent to its terms. No formal contract was executed and apparently neither party supposed that any further writing was

needed. After the claimant had received this letter and signed the endorsement, the contracting officer told him to "Go ahead and get all the tugs and lighters together and be ready to handle the ships as fast as possible." Claimant did so, but after part of the work had been done, the officer instructed him to discontinue its performance, although claimant was prepared to complete it and offered to do so. All of these facts were set up in the petition; the Government demurred, contending that the petition set up no contract made in conformity with Sec. 3744, Revised Statutes, and, therefore, the breach complained of could not have been committed and the United States could not be held liable. The demurrer was sustained with respect to the portion of the claim founded upon the alleged breach of contract. Subsequently the claimant obtained judgment on *quantum meruit* for the part of the service which he had performed (46 *C. Cls.*, 616). In its opinion sustaining the demurrer, the court said (41 *C. Cls.*, 76, 80):

> "It is clear that the reply letter of the Quartermaster set out in the petition does not constitute a valid written contract under the provisions of Section 3744 of the Revised Statutes, hereinafter quoted. * * *
>
> "It has been repeatedly held by this court and by the Supreme Court that this statute is mandatory, and that any contract made contrary to its provisions is *absolutely void.*"

*Gillespie v. United States* (47 *C. Cls.*, 310). The suit was for damages for breach of contract. On motion for new trial the government contended that no contract had been made because the bargain in question had not been reduced to writing and signed in the manner required by Sec. 3744, R. S. An engineer of the United States Army, acting under the authority of the War Department,

advertised for bids to perform work upon an improvement of the Mississippi River. The plaintiff submitted the lowest bid and the engineer wrote to him saying that his bid had been accepted. Thereupon plaintiff procured the equipment needed for the work and began to perform it. After he had been engaged in so doing for about four months, the engineer cancelled the bargain without giving written notice. Plaintiff suffered loss in consequence of this and brought suit for damage, alleging a breach of contract. In its opinion the court said:

> "The point is made for the first time upon the motion for a new trial, that the *contract is void under Section* 3744 of the Revised Statutes. * * * It has been settled by many decisions of this court and the Supreme Court also, that the statute is mandatory."

After citing the case of the *South Boston Iron Company v. United States (supra)*, the opinion continued:

> "So the only question in the present case is whether *the facts as stated show a contract within the statute. It appears too plain for argument that the making of a bid and its acceptance, both in writing, though otherwise a valid contract, do not constitute a contract 'reduced to writing and signed by the parties with their names at the end thereof' as provided by the statute."*

The effect that the courts have given, 3744 R. S., in this case is in harmony with that given other statutes of the same nature. The case of the *Richmond Standard Steel Spike & Iron Co. v. Chesterfield Coal Co.* (160 *Fed. R.*, 832), involved the interpretation of a statute of Virginia which provided that no action should be brought upon an agreement to render a service which was to extend beyond one year, unless

the agreement should have been reduced to writing and signed by the party intended to be charged with its performance. It was agreed between the parties that the defendant should furnish coal to the plaintiff, making deliveries from time to time throughout a period greater than a year. This was reduced to writing, and the corporate names of the parties were appended in typewriting with blanks intended to be filled with the signatures of their respective contracting officers. The instrument was signed by plaintiff's vice-president, but was not signed by a representative of the defendant. After making some of the deliveries the defendant company refused to make any more and the plaintiff brought his action for breach of contract. The court said:

> "It may be taken for granted, and there are strong circumstances to sustain the conclusion, that the parties in the outset intended to enter into a contract so executed as to meet the requirements of the Virginia statute and the plaintiff in error, through its vice-president, signed the blank under its name that had been attached by the typewriter. But the contract in this condition was only partially executed and could not be treated as completed until the president or other properly authorized officer or agent of the defendant had signed also in the blank left by the typewriter for that purpose. It cannot, therefore, in our opinion, be reasonably insisted that the contract was in writing and signed by the parties as required by the laws of the State of Virginia."

After the first trial of the case at bar, the district judge filed an opinion in which he said (197 Fed. R., 995):

> "If the statute here under consideration were to be construed as allowing the contractor to escape his engagements because he fails to sign as he has promised, then this statute might well be entitled 'An Act to promote fraud.'"

With that proposition the Circuit Court of Appeals did not agree. It said (206 *Fed. R.*, 443):

> "It cannot be that the validity of a contract depends upon whether the party of the first part or the second part is seeking to enforce it. Such a construction would enable the government, in cases like the one at bar, to enforce an unsigned agreement, if favorable to it and repudiate it if favorable to the other party."

It appears from a recent case (*American Dredging Company v. United States*, 49 *C. Cls.*, 350) that the departments of the government subject to the statute both can and commonly do protect themselves against loss or inconvenience that might arise from the refusal of a successful bidder to execute a binding contract and at the same time give the statute the effect given it by the judicial decisions. Barney, J., delivering the opinion, said (p. 360):

> "Had it not been for Section 3744, Revised Statutes, requiring contracts with the War Department to be in writing, signed by the parties at the end thereof, the bid of the claimant and its acceptance by the government would have constituted a valid contract. (*Harvey v. United States*, 105 *U. S.*, 671.) In lieu of that manner of making contracts the statute cited provides that contracts with certain departments of the government shall be executed in the manner stated, *and the Supreme Court has held that that statute is mandatory and that contracts made with such departments are absolutely void unless so executed. The government secures itself, however, by compelling the party bidding to enter into a bond to execute the contract as provided by Section 3744, if his bid is accepted. The bidder is without any remedy in the event the government should refuse so to do. He must bide his time till the government sees fit to act, and when it does act he must acquiesce or take his chance to have his bond sued.*"

## II.

> The transportation of the Navy Department's coal to San Francisco was a matter from which it alone could derive benefit. In procuring the diversion of the Baker Company's steamers, the Department did not relieve the New York & Porto Rico Steamship Company of any obligation to furnish transportation for no such obligation had been assumed. The United States cannot recover upon a *quantum meruit*.

A court of the United States possesses no authority to take any case out of the statute of frauds, expressed in Section 3744, Revised Statutes, on grounds of morality or public policy. Even if such authority existed nothing contained in the present record would furnish justification for such a course. In the case of Montecute v. Maxwell (1 *P. Williams*, 518), Parker, Lord Chancellor, said:

> "In cases of fraud, equity should relieve, even against the words of the statute, as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former. In this or such like case of fraud equity would relieve; *but where there is no fraud, but only reliance upon the honor, word or promise of the defendant the statute making those promises void, equity will not interfere.*"

The rule thus stated remains the rule to-day (3 *Jones Com. on Evidence*, 1913, *Sec.* 412, *p.* 68).

The rule forbidding informal transactions, like the one in question, and denouncing them as void, was created by statute of the United States. Invoking that rule the United

States has frequently availed itself of the opportunity to recede from bargains which it came to regard as undesirable, simply by declining to pursue the course essential to make them binding. In cases like that of Clark, it has been enabled to avoid paying indemnity for losses caused by it, which it would have been obliged to pay, in the absence of the statute.

The officials who represented the government in the instant case knew the law and knew what was necessary to be done in order to comply with it. That is manifest from the fact that on December 9, 1909, the Department sent the Steamship Company for execution a formal proposal, which, if signed by the company, would have been the first step toward the formation of a valid contract. Paymaster Peoples testified that having learned from the Steamship Company about the difficulties that it was experiencing in securing tonnage, he had become satisfied that the Steamship Company would not furnish the transportation named in its tender of November 13th, and on December 13th, without definite notice from the Steamship Company and without making inquiry, he assumed that it would not do so, and accordingly opened negotiations with the Baker Company. Up to that time the Department had been content to let the bargain remain in a condition where the government would be free to recede from it if it felt so disposed. As a matter of fact, there was never a moment when the Department would have been obliged to accept vessels if any had been furnished by the Steamship Company, or when the company could have held the government liable for refusing to accept them, or even recovered on *quantum meruit* for any expense to which it might have been put in chartering vessels to be used in furnishing the transportation. With affairs in this condition the Steamship Company told the Department on December 14th that it could not furnish the

transportation and requested the Department to procure it from third parties. The company's letter by which this notice was given, contains no promise by the company to indemnify the government, but merely a request that it be notified in advance of the terms on which the government could secure the transportation. The evident purpose of this request was to give the company an opportunity to decide whether, from motives of policy, it would elect to observe its "unbinding bargain" and voluntarily indemnify the government wholly or in part. Without advising the Steamship Company of the terms on which it could secure the transportation the Bureau proceeded to close a bargain with the Baker Company for the transportation of coal representing nearly 50 per centum more than the amount considered in the dealings between the Bureau and the Steamship Company. The coal belonged to the government and was transported for it and was delivered to the government. The Department being the only one who could derive benefit from the transportation was the only one that did so. The diversion of its own coal for its own benefit was a thing that was perfectly competent and proper for the department to arrange and required no assent or co-operation from the Steamship Company.

*Levy v. Bush* (45 *N. Y.*, 589, 596). In its opinion the Court of Appeals said:

> "But no case can be found where a contract has been taken out of the statute in favor of a party who had no existing interest in the property, who had done no act of part performance, who had parted with nothing under the contract, simply upon the ground that the other party was guilty of a fraud in refusing to perform his verbal agreement. *That is all there is of this case, except the offer of performance by the plaintiff. To hold that to be sufficient to take the case out of the statute,*

*would repeal it. Care must be taken that this is not done, under an idea that as the statute was enacted to prevent fraud, it cannot be applied to cases where it appears that, in a moral sense, a party is attempting to perpetrate a fraud. A party in no legal sense commits a fraud by refusing to perform a contract void by its provisions. He has not, in that sense, made a contract, and has a perfect right both at law and in equity to refuse performance."*

*Wheeler v. Reynolds* (66 *N. Y.*, 227, 234):

"The mere refusal to perform a parol agreement void under the statute may be a moral wrong, but it is, in no sense, a fraud in law or equity."

*Seymour v. Cushway* (100 *Wis.*, 580, 592):

"And a party in no legal sense commits a fraud by refusing to perform a contract void by the provisions of the statute of frauds. He had not, in a legal sense, made a contract, and has a perfect right, both at law and in equity, to refuse to perform. He may stand upon the law and refuse. As said in *Brandeis v. Neustadl*, 13 *Wis.*, 150: 'All that the parties may say or do, short of reducing their agreement to writing, expressing the consideration, and causing it to be subscribed by the party making the sale, affords the Court no solid ground, or colorable pretext even, for noticing it or knowing that anything of the kind has ever transpired."

The United States did nothing for the Steamship Company and the Steamship Company derived no benefit from anything done by the United States. There can be no recovery on *quantum meruit*.

In *Nichols v. Mitchell* (30 *Wis.*, 329, 332), it was said:

*"Certainly, a mere request made by the defendant to the plaintiffs to do an act, which the evidence tends*

*to show, and probably shows, that they had, by virtue of the custom of merchants, where these transactions took place, a perfect right to do, with precisely the same results, had no such request been made, and a compliance therewith, cannot properly be held to operate as an execution of the original void contract. We find nothing in the case which vitalizes that contract, or gives to it any validity or effect whatever.* Such being the case, it is idle to invoke in support of a judgment herein, the rules of law concerning the obligations of a person to reimburse another for moneys paid by him to the use of the former. While that remains a void contract, the plaintiffs have not paid for the use of the defendant the difference between the contract price of the wheat and the price for which they purchased in the same, but they have paid such difference for their own use, and cannot lawfully recover the amount thereof of the defendant."

In the brief for the United States (*pp.* 17-20) it is argued that the requirements of Section 3744 do not extend to and bind the government. This proposition is founded upon the statement that the United States is not named in the statute. We submit that the United States is both named herein and that the primary purpose of the statute was to provide a method by which certain agents of the United States should make contracts in its behalf, and to render that the only lawful way in which contracts could be made.

Again the government contends (Brief, *pp.* 20-24) that the United States does and should occupy a most favored position, even in its dealings of a purely commercial nature. It is urged that this favor should extend to relieving the government and its agents from the necessity of observing any requirements of law relating to such transactions, where they would operate to the advantage of an individual and to the disadvantage of the government. This proposition is concededly evolved from the English maxim, "The King can do

no wrong," and this court held long ago that that maxim has no place or equivalent in our system of government. It said (*Langford v. United States*, 101 *U. S.*, 341, 342):

> "We have no king to whom it (the maxim) can be applied. The President, in the exercise of the executive functions, bears a nearer resemblance to the limited monarch of the English government than any other branch of our government, and is the only individual to whom it could possibly have any relation. It cannot apply to him, because the Constitution admits that he may do wrong, and has provided a means for his trial for wrongdoing, and his removal from office if found guilty by the proceeding of impeachment. * * * It is to be observed that the English maxim does not declare that the government, or those who administer it, can do no wrong; for it is a part of the principle itself that wrong may be done by the governing power, for which the ministry, for the time being, is held responsible; and the ministers personally, like our President, may be impeached; or, if the wrong amounts to a crime, they may be indicted and tried at law for the offense."

Whatever may be the disposition of courts and others to favor the government in a proper case, it has never been held or suggested that the favor should extend to giving language, contained in a statute, one interpretation when that may serve the purposes of the government, and quite a different interpretation when the government's interest could be furthered by the latter.

In this case the rights of the government, as well as those of the Steamship Company, must be measured by the rule or standard which has been created by the statute.

*Cooke v. United States*, (91 *U. S.*, 389):

> "If it (the United States) comes down from its position of sovereignty and enters the domain of commerce,

it submits itself to the same laws and govern individuals there."

*United States v. N. A. C. Co.* (74 *Fed. R.*, 145, 151):

> "When the government enters into a contract with an individual or corporation it divests itself of its sovereign character so far as concerns the particular transaction and takes that of an ordinary citizen; and it has no immunity which permits it to recede from the fulfillment of its obligation."
>
> *Southern Pacific Co. v. United States* (28 *C. Cls.*, 77, 105);
>
> *The Purcell Envelope Co. v. United States* (47 *C. Cls.*, 24).

We submit: The weight of evidence is to the effect that the diversion of the Baker Company's vessels had no real connection with the transaction between the department and the New York & Porto Rico Steamship Company. There is no evidence competent to prove that the United States sustained loss to the amount claimed or in fact any loss because the Steamship Company did not tender vessels for loading, as promised. Even if these things had been established by competent proof, it would still appear that the complaint of the United States is bad in principle, for it is directed against the practice, which the United States has employed in dealing with individuals and from which it has derived substantial advantage. The loss complained of here is insignificant when compared with losses experienced by individuals in the numerous cases where the statute has been invoked by the government.

We submit that, for the reasons given, the judgment of the Circuit Court of Appeals should be affirmed.

JAMES H. HAYDEN,
NORMAN B. BEECHER,
RAY ROOD ALLEN,
Of Counsel for the Defendant in Error.

# UNITED STATES OF AMERICA *v.* NEW YORK AND PORTO RICO STEAMSHIP COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 44. Argued November 3, 1915.—Decided November 15, 1915.

Even if a statute declares a transaction void for want of certain enumerated forms, the party for whose protection the requirement is made may waive it; void in such cases meaning only voidable at that party's choice.

The object of Rev. Stat., § 3744, providing that certain officers of the Government reduce all contracts to writing, is to furnish the needed protection for the United States and not for the private individual who does not need such protection; and, notwithstanding informality of execution on the part of the Government, if the other contracting parties did actually contract, he can be held to performance.

209 Fed. Rep. 1007, reversed.

THE facts, which involve the construction of § 3744, Rev. Stat., and the liability of a contractor on a contract with the Government for transportation of coal, are stated in the opinion.

*The Solicitor General*, with whom *Mr. Robert Szold* was on the brief, for the United States:

Revised Stat., § 3774, is no bar to suit by the Government on executory parol contracts.

The statute does not render the contract illegal but only unenforceable. It affects not the validity of the contract but the remedy thereon. *Clark* v. *United States*, 95 U. S. 539; *St. Louis Hay Co.* v. *United States*, 191 U. S. 159; *United States* v. *Andrews*, 207 U. S. 229; Browne on Stat. of Frauds, 5th ed., § 115a.

Revised Stat., § 3774, is solely for the protection of the

Government. *Clark* v. *United States, supra; Dollar Savings Bank* v. *United States*, 19 Wall. 227; *United States* v. *Verdier*, 164 U. S. 213.

The Government may waive compliance with statutory forms required for its protection. *Bailey* v. *United States*, 109 U. S. 432; *McGowan* v. *Parish*, 237 U. S. 285, 294, 295, and cases cited.

Since the Government is not expressly named in the statutes, its remedy by suit on a valid common-law contract is not barred.

The Government may take the benefit of a statute, but it is not bound thereby unless expressly named. *Stanley* v. *Schwalby*, 147 U. S. 508, 514; *S. C.*, 162 U. S. 255.

The signed offer and acceptance in writing constitute compliance with the statute. *Adams* v. *United States*, 1 Ct. Cl. 192; *Johnston* v. *United States*, 41 Ct. Cl. 76.

The statute does not apply to executed contracts and is no bar to suit on a parol contract after performance by plaintiff. *St. Louis Hay Co.* v. *United States*, 191 U. S. 159, 163; *United States* v. *Andrews*, 207 U. S. 229.

*Mr. James H. Hayden*, with whom *Mr. Norman B. Beecher* and *Mr. Ray Rood Allen* were on the brief, for defendant in error:

The breach of contract complained of could not have occurred for there was no contract to break. The company never became obligated to furnish the transportation or to indemnify the United States.

The transportation of the Navy Department's coal to San Francisco was a matter from which it alone could derive benefit. In procuring the diversion of the Baker Company's steamers the Department did not relieve the New York and Porto Rico Steamship Company of any obligation to furnish transportation, for no such obligation had been assumed. The United States cannot recover on *quantum meruit*.

In support of these contentions, see *Adams* v. *United States*, 1 Ct. Cls. (N. & H.) 192; *American Dredging Co.* v. *United States*, 49 Ct. Cls. 350; *Clark* v. *United States*, 95 U. S. 539; *Cooke* v. *United States*, 91 U. S. 389; *Danolds* v. *United States*, 5 Ct. Cls. 65; *Gillespie* v. *United States*, 47 Ct. Cls. 310; *Henderson* v. *United States*, 4 Ct. Cls. 75, 81, 84; *Johnston* v. *United States*, 41 Ct. Cls. 76 and 46 Ct. Cls. 616; *Langford* v. *United States*, 101 U. S. 341, 342; *Levy* v. *Bush*, 45 N. Y. 589, 596; *McLaughlin* v. *United States*, 37 Ct. Cls. 150, 185; *Monroe* v. *United States*, 184 U. S. 524; *Montecute* v. *Maxwell*, 1 P. Williams, 518; *Nichols* v. *Mitchell*, 30 Wisconsin, 329, 332; *Richmond Iron Co.* v. *Chesterfield Coal Co.*, 160 Fed. Rep. 832; *Russell* v. *Le Grand*, 16 Massachusetts, 35; *St. Louis Hay Co.* v. *United States*, 191 U. S. 159; *Seymour* v. *Cushway*, 100 Wisconsin, 580, 592; *South Boston Iron Co.* v. *United States*, 118 U. S. 37; 18 Ct. Cls. 165; *Southern Pacific Co.* v. *United States*, 28 Ct. Cls. 77, 105; *Purcell Envelope Co.* v. *United States*, 47 Ct. Cls. 24; *United States* v. *Andrews & Co.*, 207 U. S. 229; *United States* v. *N. A. C. Co.*, 74 Fed. Rep. 145, 151; *Wheeler* v. *Reynolds*, 66 N. Y. 227, 234; Cong. Globe, Vol. 31, pp. 276, 369, 390, 403, 421; Vol. 32, p. 206; 3 Jones Com. on Evidence (1913), § 412, p. 68.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the United States to recover the increased cost of transportation for coal, above a price that the defendant had agreed to accept for the service; the latter having notified the Government that it would not furnish the steamers agreed. There is no dispute as to the facts. On November 9, 1909, the plaintiff requested in writing that the defendant make a tender for the transportation of not less than 8,000 tons of coal from certain Atlantic ports at the option of the plaintiff to Mare Island or San Francisco, with stipulations as to

time. On November 13 the defendant submitted an offer which the plaintiff accepted by telegraph on the same day. On November 15 the defendant wrote acknowledging the telegram and saying that it could advise in due course what steamers it would tender. There was further correspondence on the footing of a mutual contract, but on December 14, the defendant's attorney wrote stating that it believed that a combination had been made with intent 'to cause it to make default under its engagement to your Department or else to suffer heavy loss,' and requesting the plaintiff to procure the transportation if it could be done at reasonable cost, letting the writer know the terms of any contract before it was closed. The plaintiff thereupon got the transportation elsewhere. The declaration is in three counts; two upon the contract and a third for money paid at the defendant's request. At the first trial the plaintiff had judgment. 197 Fed. Rep. 995. This judgment was reversed by the Circuit Court of Appeals. 206 Fed. Rep. 443. 124 C. C. A. 325. At a second trial on this same record both parties moved that a verdict be directed, and a verdict was directed for the defendant. The judgment was affirmed by the Circuit Court of Appeals. 209 Fed. Rep. 1007. 126 C. C. A. 668.

The only matter for our consideration is whether the court below was right in ruling as matter of law that there was no binding contract, and therefore we may lay on one side some details that were dwelt upon by the defendant but that do not affect this question. The ground of the defence is Rev. Stats., § 3744. By this section it is made the duty of the Secretaries of War, the Navy and the Interior to cause every contract made by their authority on behalf of the Government 'to be reduced to writing, and signed by the contracting parties with their names at the end thereof'; all the copies and papers in relation to the same to be attached together by a ribbon and seal, &c. A formal proposal, varying, the defendant says, from that

which was accepted in the letters, was sent to the defendant, and received by it on December 11, but never was signed, and the defendant contends that, however it might be otherwise, the statute makes the informal agreement by correspondence void.

The statute does not address itself in terms to the effect of the form upon the liability of the parties, like the Statute of Frauds. Whatever effect it has in that way is not a matter of interpretation in a strict sense, but is implied. The extent of the implication is to be gathered from the purpose of the section and such other considerations as may give us light. The section originally was part of the Act of June 2, 1862, c. 93, 12 Stat. 411, and its purpose is manifested by the scope of the act and its title. It is called "An Act to prevent and punish Fraud on the Part of Officers intrusted with making of Contracts for the Government," and this was recognized as the purpose in *Clark* v. *United States*, 95 U. S. 539. In that case some of the Justices thought that the decision went too far in treating the section as a statute of frauds even in favor of the United States; and while it is established that a contract not complying with the statute cannot be enforced against the Government, it never has been decided that such a contract cannot be enforced against the other party. The prevailing opinion cannot be taken to signify that the informal contract is illegal since it went on to permit a recovery upon a *quantum valebat* when the undertaking had been performed by a claimant against the United States. *United States* v. *Andrews*, 207 U. S. 229, 243. Of course the statute does not mean that its maker, the Government, one of the ostensible parties, is guilty of unlawful conduct, or that the other party is committing a wrong in making preliminary arrangements, if later the Secretary of the Navy does not do what the act makes it his duty to do.

There is no principle of mutuality applicable to a case

like this, any more than there necessarily is in a statute requiring a writing signed by the party sought to be charged. The United States needs the protection of publicity, form, regularity of returns and affidavit, Rev. Stats., §§ 3709, 3718–3724, 3745–3747, in order to prevent possible frauds upon it by officers. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the Government not upon him. We see no reason for extending the implication of the act beyond the evil that it seeks to prevent. Even when a statute in so many words declares a transaction void for want of certain forms, the party for whose protection the requirement is made often may waive it, void being held to mean only voidable at the party's choice.

*Judgment reversed.*